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ABSTRACT

This document is a collection of 32 1998 Education Law Association conference papers. The collection includes the following papers: "The More We Change: Meeting the Requirements of Unitary Status" (Angela M. Sewall and Ann E. Witcher); "Everything You Need To Know about Discipline of Students with Disabilities" (David T. Duff, Allan Osborne, Jr., and Perry A. Zirkel); "Law and Practice: The Testing and Assessment of Students with Disabilities" (Diana Pullin); "Mediation in Education: Annual Update" (Steven S. Goldberg and Ed Mills); "Trying To Read the Courts on Religion in the Schools: Mapping Our Way into the New Millennium" (Frances R. A. Paterson); "E-Mail and Open Meeting Laws" (Thomas Carroll and C. Robert Heath); "The Law Governing Sexual Harassment in Public Schools" (Nelda Cambron-McCabe, Martha McCarthy, Julie Underwoood, and L. Dean Webb); "Student Suicide: Legal Ramifications for Educators and Schools" (Steven D. Rittenmeyer and Don W. Schussler); "The Impact of the 1997 IDEA Amendments on the IEP Process" (Mary Jane K. Rapport and Wanda J. Routier); "Fourth Amendment Update: Search and Seizure Cases in Public Schools" (Jacqueline A. Stefkovich); "The Pendulum Swings to Accountability: A Review of the Role of Due Process and Performance Standards" (John A. Brown, W. Bradley Colwell, Richard Kent Murray, Paul W. Thurston, and Michael T. McCoy); "Preventive Law: An Essential Ingredient for Teacher Education Programs" (Donna Thomas, Lawrence T. Kajs, Chris Cox, Marianne Reese, and Carole Funk); "Sexual Harassment Revisited" (Alexa R. Ross, Nan Stein, and Ann Clarke Snell); "Discipline and Behavior under the IDEA Reauthorization" (Christine J. Villani, Cynthia Dieterich, and William Shula); "Labor Relations in Religiously-Affiliated Educational Institutions" (David L. Gregory, Ralph D. Mawdsley, and Charles J. Russo); "School Finance Mechanisms" (Frank Brown); "Violence and Threats of Violence in Public Schools: Reasonable Force, Restraint and Discipline Strategies" (Joseph Beckham, Patrick Gray, Wolfgang W. Halbig, and Charles Wolfgang); "Dress Codes: A Study of Perceptions, Policies, and Precepts" (Todd A. DeMitchell, Richard Fossey, and Jim Walsh); "Student-to-Student Sexual Harassment: A Taxonomy of Court Decisions--Which Tack Will the Supreme Court Take in a Sea of Analyses?" (Kathleen A. Sullivan); "Learning the Law: The Growing Field of

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In-House School Counsel" (Gregory M. Logan and Henry I. Willett, Jr.); "The Rights of Higher Education Students with Disabilities" (Stephen B. Thomas); "Student Discipline Post-IDEA Reauthorization: Will the Pendulum Swing Back toward Segregated Settings?" (Cheri C. Magill, Kathleen S. Mehfoud, John S. Oehler, and Richard S. Vacca); "Academic Freedom in Classroom Instruction: The Myths and the Realities" (John L. Strope, Jr., Donald F. Uerling, and Bernadette Marczely); "What Can (and Should) a School District Do To Create Safe Schools?" (Mary H. B. Gelfman); "Peer-to-Peer and Same Sex Sexual Harassment" (Margaret A. Chidester, Geraldine Jaffe, and Karen L. Michaelis); "Internet and E-Mail Policies in Schools" (Jon E. Anderson); "Legal Pitfalls of IEP Meetings" (Susan G. Clark and Julie C. Martin); "Navigating Education Law Dissertation Waters to Safe Harbor and Professional Involvement" (Amy M. Abernethy, Lois F. Berlin, Joan L. Curcio, and Louis M. Millhouse); "Who Owns Intellectual Property Used in the Electronic Classroom?" (Kenneth E. Lane, Michael D. Richardson, and Dennis W. Van Berkum); "Is Affirmative Action in University Admissions Unconstitutional? 'Bakke and Hopwood' Reconsidered" (Philip T. K. Daniel); "We Are What We Wear: Revisiting Student Dress Codes" (Christopher B. Gilbert); and "Equal Opportunity in Interscholastic Athletics: Identifying and Eliminating Gender Barriers" (Raymond L. Gregory, Robert R. Hunt, and John W. Murry, Jr.). (Each paper contains references.) (RT)

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NOVEMBER 19 – 21, 1998
CHARLESTON, SOUTH CAROLINA

LEGAL RIGHTS IN EDUCATION: *PENDULUM SWINGS*

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THE MORE WE CHANGE:
MEETING THE REQUIREMENTS OF UNITARY STATUS

by

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The More We Change...

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Prior to the 1950s, many states permitted racial segregation, with courts adhering to the *separate but equal* doctrine announced by the Supreme Court in the 1896 Plessy v. Ferguson case. This decision, coupled with Jim Crow laws, resulted in de jure segregation that affected public accommodations, extended to public education, and continued well into the 20th Century. Simply stated, the judicial system was content to allow *access* to racial minorities but gave no heed to the issue of equity and little attention to equality.

In the 1950s, the concerns of federal courts relative to desegregation were quite simple. *Equality of opportunity* and *access* were key and, as such, were enunciated over and over in such landmark cases as Brown I and II. If such equality could be achieved within the context of a *freedom of choice* plan, federal jurists were more than willing to approve that approach.

During the 1960s and '70s, the focus of litigants and the courts in desegregation cases turned to *equity*. Increasingly, courts delved into specific components of desegregation plans and alternately suggested and required inclusion of these components in the "plan," as well as compliance with the written plans after such inclusion. Frequently in the 1970s, the courts began to consider any allowance of so-called freedom of choice to be a prima fasciae cause of defacto segregation. In fact, in the Green case, the court had made the point that freedom of choice was not an end in itself in desegregation of school districts.[1] Freedom of choice was not seen as an acceptable or sufficient step in the transition to unitary status, ie., release from the aegis of the courts with the establishment of the fact that the district is not engaged in or tacitly approving segregative activities or policy, and that absent any actions of the school district as represented by the board of education, defacto segregation will not lend itself to a re-intervention of court monitoring.

Courts held that the state, as represented by the school board, must provide a remedy or remedies to address segregative activities and effects. Such remedies were to be affirmative and positive to include many forms of address including but not limited to busing and quotas. In the Swann Case, the court noted that in addition to busing, districts could close schools, build new schools, reassign students, reconfigure grade assignments, and racially mix faculties.[2] These were but a few of the suggested and allowable approaches to desegregation.

Beginning in 1972, national cases portended the end of freedom of choice. First, the court added to the equation for desegregation that, in addition to the established standard of pairing and changing student assignments and attendance zones, consideration of motives was not sufficient; the effects of actions taken would have to receive major consideration.[3] Second, the court addressed the issue, not unlike that raised in Brown I, of the quality of facilities of inner city schools calling for these facilities to be comparable to those found in predominately white suburban areas.[4] Finally, the court placed the burden on the school district and its officials to prove that their actions were not motivated by segregative intent; in fact, the court "observed that community and administrative attitudes must be taken into consideration."[5]

Once these parameters were clearly defined, the goal of most school boards presiding over school districts that had been touched by law suits became the achievement of unitary status. Throughout the 1980s, however, desegregation issues continued to arise in districts, and remedies began to include annexation of parts of contiguous districts into desegregating districts (as was the case in Little Rock, Arkansas) and the combination of districts into one district (as in the case of Atlanta and Dekalb County, Georgia).

Since the 1980s, there has been racial strife within many districts, and in the case of Dallas, Texas, within the membership of the school board. However, as more and more districts are released from court jurisdiction, there is a return in many of these districts to the concept of neighborhood schools and freedom of choice. Courts do not seem to be intervening in these cases. It is clear, however, that issues relative to desegregation continue to exist even in the face of significant changes in the philosophy of the courts from freedom of choice and back toward it between 1974 and 1997.

Some researchers, such as Gary Orfield of Harvard University, are alleging that the change in the courts' philosophical position to a return to allowing freedom of choice in districts that have achieved unitary status is evidence that the nation is headed backwards toward greater segregation of black students, particularly in the states with a history of de jure segregation. Simultaneously, there is an increasing call from black leaders for schools that are not only all black but also, in some cases, single sex schools. Additionally, both black and white parents are tending to agree with the court that like freedom of choice, busing, and other remedies have not managed to completely dismantle the old dual system even though both black and white parents may tend to favor integration.

Currently, "the challenge (for citizens and undoubtedly for the legal system including the courts) is to understand the present situation as it has arrived from the past and to chart a new path to a stable public school system. In an effort to do that, the courts and seemingly the public have come virtually full circle in terms of methodology for accomplishing the goal. Happily, however, there is an abiding conviction of the importance of integration and desegregation innate to society as a result of more than forty years of litigation and self-examination by our American public school system.

Background and Significant Cases

The pre-1850 education of a black Bostonian youngster, Sarah Roberts, provided the genesis for the well-known doctrine of separate but equal.[6]

Roberts v. City of Boston, 59 Mass. 198 (1849). The opinion of Justice Shaw of the Massachusetts Court established the viewpoint that school segregation was for the good of both races.

Fourteenth Amendment (1868). Although it included the Equal Protection Clause, the Supreme Court continually determined that equal protection had no application to private enterprise.[7] Moreover, with the Mississippi state statute upheld that required segregated train cars, the Equal Protection Clause being circumvented, "state-enforced classification of citizens by race was made possible."[8] As a result, Southern states began extending the private custom of discrimination into state law, and Jim Crow laws, originating in Florida in 1887, became prevalent.

Plessy v. Ferguson, 163 U.S. 537, 1896. Established the national standard for applying the Fourteenth Amendment according to local custom and tradition.[9] The U.S. Supreme Court determined that separate but equal was constitutionally acceptable thereby establishing it as a legal principle, with the opinion extended to education by implication. Furthermore, the federal judiciary continually upheld the rights of states to determine their methods of education, e.g., in Cumming v. Richmond County Board of Education (175 U.S. 528, 20 S.Ct. 197, 1899), Berea College v. Commonwealth of Kentucky (211 U.S. 45, 29 S.Ct. 33, 1908), and in Gong Lum v. Rice (275 U.S. 78, 48 S.Ct. 91, 1927) the federal courts supported unlimited state discretion in maintaining a separate system of education for the races.[10]

Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 59 S.Ct. 232, 1938. The greatest challenge to the practice of separate but equal education was initiated by the N.A.A.C.P.[11] The U.S. Supreme Court reasserted its judicial authority in applying the Equal Protection Clause leading to relief at post-secondary school institutions.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 1943. A change in the direction of the court with regard to the common school occurred in this case. The court held that state actions taken against that which the Fourteenth Amendment protects include actions by a state board of education. The decision implied that state actions can limit Fourteenth Amendment rights, but that individual students have rights that may not be violated by actions of the state.

Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483, 1954. Also known as Brown I, was the first case to address student rights in public education rather than student rights in relation to attendance at graduate or professional schools. Chief Justice Earl Warren, writing for the court, stated: "We conclude that in the field of public education the doctrine of separate but equal has no place. Separate educational facilities are inherently unequal."[12]

Bolling v. Sharpe, 347 U.S. 294, 1954. A companion case to Brown, it addressed segregation as it related to children in the schools in the District of Columbia. The Supreme Court extended the term "liberty," as it is used in the Fifth Amendment, to the full range of conduct that the individual is free to pursue and that cannot be restricted except by a proper government objective. Segregation was not such a government objective.

Brown v. Board of Education of Topeka, 349 U.S. 294, 1955, "Brown II." Heard by the Supreme Court as it addressed the question of relief, ie., the remedy for and enforcement of that which would bring about the end of desegregating practices addressed in Brown I. Chief Justice Warren in speaking for the court declared that desegregation efforts were to be approached "with all deliberate speed."[13] The court also held that school authorities have the primary responsibility for solving problems that may require such solutions as are necessary to fully implement constitutional principles.

The main struggle to secure racially balanced schools occurred in two phases and took place in the courts. Initially most desegregation occurred as a result of parents' desire for their children, or students themselves deciding, to attend a particular school that was segregated by policy or law. Therefore, the earliest, first-phase attention was focused on the de jure segregated schools with the later phase focusing on de facto segregated schools. The court's attention would turn to cases of de facto segregation, namely, situations in which there was an absence of intent to segregate but in which segregation did occur due to community demographic patterns or past action not intended to segregate. While de jure segregation is unconstitutional, de facto segregation would be held as not violative of the constitution. Such situations had to be scrutinized, however, to ensure that, in fact, there was lack of intent.

During the early years following Brown, the focus was on de jure segregated schools in Southern states and comprised cases challenging the notion that Brown merely prohibited segregated schools. The most blatant example occurred early in the 1960s in Prince Edward County, Virginia where the public schools were closed, and private schools operated using state and county monies. This strategy, a freedom of choice plan, was a school policy whereby a student's parents could select the school that they wished their child to attend without regard to attendance zones.[14] In Griffin v. County School Board of Prince Edward County (377 U.S. 218, 1964), the Supreme Court struck down Virginia's freedom-of-choice plan and ruled that the closing of public schools and the contribution of tax funds so that students might attend segregated private schools was a violation of the Equal Protection Clause.

In Northern states, residential patterns had created racially segregated schools. In time, black families began moving and enrolling their children in all-white schools. In these cases, a multitrack system of education was generally introduced that separated the children into groups according to their learning ability. This approach, in effect, separated the students along racial lines and proved to camouflage a highly segregated educational program.[15]

Although no one questioned that Brown prohibited the government from compelling segregation, a question did arise as to the necessity of government intervention to promote integration. As such, attention was focused on defining the concepts *integration* and *segregation*, especially in the Northern courts.[16] What resulted was the view that the Constitution forbade segregation but did not require integration. At the same time, the U.S. Court of Appeals for the Fifth District "held that there was indeed an affirmative duty on the part of government to integrate the schools where de jure segregation had existed prior to Brown."[17] A rule of law evolved that required affirmative action by Southern de jure states, but did not force Northern de facto states to act affirmatively to move children to assure integrated schooling.

Civil Rights Act of 1964. Its passage "gave teeth to federal desegregation efforts by decreeing that federal monies would be withheld from institutions that discriminated according to race, religion, or ethnic origin."[18] In 1966, the U.S. Office of Education attempted to apply pressure for racially balanced schools by threatening to cut off federal funds earmarked for education. Interestingly, Meyer Weinberg stated that during the four years following the passage of the Civil Rights Act much more desegregation occurred than in the years following Brown and ending with the Civil Rights Act itself.[19]

Green v. County School Board of New Kent County, 391 U.S. 430, 1968. In this landmark case, heard by the Fourth Circuit and then by the Supreme Court, the school board was maintaining two schools on opposite sides of a community in which there was no residential segregation. The Board had chosen to remain eligible for federal funds by adopting a freedom of choice plan in which all but first and eighth grade students could choose where they would attend school. Both the District Court and Fourth Circuit Court of Appeals approved this plan. Although no white student chose to attend the all-black school, some black students elected to attend the formerly all-white school (85% of the black students within the district still attended the all-black school). The Supreme Court stated : "The burden is on the school board to provide a plan that realistically promises to work NOW."[20] Freedom of choice was not found unconstitutional but as used in New Kent County, it was not acceptable.

In addition, the Supreme Court used the terms *dual* and *unitary* for the first time as characterizations of school systems according to their desegregation status, with the term unitary appearing more as decisions were handed down during the 1970s and 1980s. The court suggested that in the "transition to a unitary nonracial system of public education...consideration had to be given to administration, condition of the school plant, and the school transportation system,"[21] all of which figure prominently in the development of desegregation plans.

Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 1970. The Supreme Court heard this landmark case which was the offshoot of a case originally heard in 1965 and a motion for further relief filed in 1968 in the same case. The District Court (1969) had ordered the school board to provide plans for faculty and student desegregation, but the court found the board plan unsatisfactory and appointed an expert to develop a plan for the district's schools. In February 1970, the expert presented a plan which the court adopted. The importance of the case lies not only in its reaffirmation of the fact that District Courts have broad powers to fashion remedies in desegregation cases, but also in the use of experts for the development of desegregation plans.[22]

In Swann, the court stated: "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."[23] This decision provides some flexibility to districts that have a high percentage of minority students and that must deal with geographic and demographic anomalies. Additionally, the court spoke to the issue of majority to minority transfers, an idea that would appear in many future cases as a possible interdistrict solution to segregation. The court defined clearly those aspects of the school and school system that would need to be considered in the development of desegregation plans for the 1970s and beyond. Also, the court asked that care be taken to ensure that future school construction did not perpetuate a dual system. An important component in this case was the holding by the court that "the constitution does not prohibit District Courts from using their equity power to order the assignment of teachers to achieve a particular degree of faculty desegregation."[24]

Swann defined the four areas to be considered relative to student assignment in desegregation cases: (1) racial quotas, but only as a starting point; (2) one-race schools, these may not be indicative of a system practicing segregation in or of itself; (3) attendance zones, the pairing and clustering of zones is considered permissible; and (4) transportation, so long as it does not risk the health of children or the educational process itself.[25] The full impact of Swann was that it was no longer simply sufficient to eliminate segregation but, rather, that desegregation had to be achieved to the greatest extent possible, using "every available device."

North Carolina State Board of Education v. Swann, 402 U.S. 43, 1970. The case was heard simultaneous to Swann v. Charlotte Mecklenberg. The court held that North Carolina's anti-busing law, which forbade assignment of any student based on race, was invalid.[26] Davis v. Board of Commissioners of Mobile County (402 U.S. 33, 1971) supported and clarified the issues in Swann.

As noted previously, the second phase of desegregation shifted attention from de jure segregation of the South to de facto segregation in other areas of the country. "In 1972, 46% of all black students in the South attended schools where white students were in the majority, as compared to only 28% in the North and the West."[27]

Keyes v. School District No.1, 413 U.S. 189, 93 S. Ct. 2686, 1973. The turning point decision in which the Court ruled that the de facto segregation of the Denver Schools was the result of intentional public policy and, therefore, in violation of Brown. Denver was mandated to racially balance its schools, even if balancing required busing.

Frequently in the 1970s, the courts began to consider any allowance of so called freedom of choice to be a cause of defacto segregation. In fact, in the Green case, the court had made the point that "freedom of choice is not an end in itself in desegregation school districts."[28] Freedom of choice was not seen as an acceptable or sufficient step in the transition to unitary status, ie., release from the aegis of the court with the establishment of the fact that the district is not engaged in or tacitly approving segregative activities or policy. The state, as represented by the school board, must provide a remedy or remedies to address segregative activities and effects. Such remedy must be affirmative and positive and may include many forms of address including but not limited to busing and quotas; however, quotas may not be used as a single approach to desegregation. In the Swann Case, the court noted that in addition to busing, districts could close schools, build new schools, reassign students, reconfigure grade assignments, and racially mix faculties. These were but a few of the suggested and allowable approaches to desegregation.

Wright v. City Council of Emporia, 407 U.S. 451, 1972. Another national case that portended the end of freedom of choice. The court added to the equation for desegregation that, in addition to the established standard of pairing and changing student assignments and attendance zones, consideration of motives was not sufficient. In fact, the effects of actions taken would have to receive major consideration.

Keyes v. School District No.1, 413 U.S. 189, 1973. This Denver case addressed the issue, not unlike that raised in Brown I, of the quality of facilities of inner city schools and called for these facilities to be comparable to those found in predominantly white suburban areas. This decision addressed itself not only to the plight of predominantly African-American schools but also to that of Hispanic students in inner city schools. Furthermore, the decision placed the burden on the school district and its officials to prove that their actions were not motivated by segregative intent.

Other defining cases followed, each moving farther and farther from the use of freedom of choice. Within American society throughout the 1970s and into the early 1980s, minorities and many white Americans continued to call for busing and mixing of the races by assignment. Charles Willie and Michael Alves from Harvard University began to suggest that the only choice school district patrons have in the schools that their children could attend should be one of controlled choice. The control had to rest with the school district officials who would attempt to but who could not guarantee the assignment of children, even if parents wished to send their children to neighborhood schools. Districts such as Cambridge, Massachusetts adopted controlled choice as an alternative to freedom of choice.

State-created district lines were recognized in litigation as potential creators of problems in attempts to desegregate. This was typified by the establishment of a special school district by the Arkansas legislature and led to the eventual creation of a 70% minority district in a city that was 30% minority by encasing the city in a ring of county districts not contiguous with the city boundaries. Little Rock could not "grow" the district as the city grew and, therefore, the financial base of the district eroded with the growth of the city.

Milliken I, 418 U.S. 717, 1974. The Midwest was not immune from addressing desegregation concerns. This Detroit case focused on racial segregation in a city school district as well as on three other districts within the metropolitan area. Calling the existing district lines "realities of political convenience," the court endorsed a metropolitan plan in which students would cross those lines in order to implement desegregation. The court did note, however, that local citizens should have the opportunity to participate in decisions with regard to how this would be accomplished in order to meet local educational needs.[29] In a similar case relative to a California school district, Pasadena City Board v. Spangler (427 U.S. 424, 1975), the Supreme Court held that a district court could not require annual adjustments of attendance zones. In a second incarnation of the Spangler case, an Appeals Court clearly stated that "the adoption of a neighborhood plan was not necessarily synonymous with an intent to discriminate."[30]

1977 brought another rendition of the Milliken case, Milliken II.[31] The contribution of the courts in this case was the addition of educational components required in school assignment plans. The State of Michigan was directed to pay for the costs of these educational components at least in part. Those mandated programs were remedial or compensatory education programs for children who had been negatively impacted by the existence, or vestiges, of segregation.[32] The idea was that because the state had at least partial responsibility for prior segregative activities, the state had at least partial responsibility for bearing the costs of remediating such practices.

The definition of unitary status clearly emerged from the combined cases of Swann, Brown II, Milliken, and others. The components of a unitary system were identified by the courts as the elimination of a discriminatory system, resolution of all constitutional violations peculiar to the district, revision of district policies to prevent recurrence of these violations, and restoration of student status to that which it would have been absent segregative activities. Once these parameters were clearly defined, the goal of most school boards presiding over school districts that had been touched by law suits became the achievement of unitary status. Throughout the 1980s, however, desegregation issues continued to arise in virtually every circuit. The remedies in some cases included receivership for the school district (Morgan v. McDonough, a Boston case); a finding that the state was at least partially culpable as well as court-ordered interdistrict remedies such as magnet schools and interdistrict transfers as the solution to segregation (U.S. v. Board of School Commissioners of the City of Indianapolis, Indiana, 632 F2d. 1101, 1980); and a mandate that required the state to pay salaries of the staff of court appointed desegregation experts who would oversee implementation of remedies ordered by the court (Oliver v. Kalamazoo, 640 F2d. 782, 1980).

It seemed that with greater frequency during the 1970s and 1980s, the courts were taking the issue of desegregation out of the hands of citizens and their elected school boards via ordering rather than suggesting remedies, appointing "outsiders" or experts to oversee desegregation, or redefining the geographical boundaries or areas and populations which would figure into the creation of remedies to segregation. In the New York cases Arthur v. Nyquist (712 F2d. 809, 1983) and Arthur v. Nyquist and Buffalo Teachers Federation (712 F2d. 816, 1983) it was made clear that the court would monitor the expenditure of dollars ordered paid by the state as a partial remedy in order to ensure the appropriate expenditure of that money to address issues of desegregation.[33]

During the second half of the 1980s, the courts went even further and began to hold cities responsible for remediating segregative practices within their jurisdictions. One such case was U.S. v. Yonkers Board of Education (624 F2d 1276, 1985). In this case, residential patterns had contributed to the problem of segregation. The city was joined in the case as having responsibility for this by virtue of past practice relative to housing subsidies within the municipality.

On the heels of this decision, petitions were filed in various courts asking for unitary status. In other cases, suits were filed and unitary status was found even though, on the face of it, the district appeared to be causing de jure segregation in its policies and activities. In Whittenberg v. School District of Greenville County (607 F. Supp. 289, 1985), the district court found that a unitary system was being operated by the school board in spite of the fact that there were population variances based on race from school to school and grade to grade. In essence, the court found that the district had made efforts to maintain a racial balance and had written policies prohibiting discrimination based on race. In its opinion, the court noted that decisions with regard to conversions, closings, and openings of schools rested primarily with the district. In other words, the court chose not to intervene.[34]

In 1986, the court in the Fourth Circuit went even further in this direction. In Riddick by Riddick v. School District of the City of Norfolk (784 F2d. 521), the student assignment plan of the district, previously declared unitary, was challenged by black students. The court maintained the unitary status and noted that the school board could legitimately consider the presence of "white flight" in pursuing a voluntary plan to stabilize school integration, absent proof of a discriminatory intent. This decision had a sense of freedom of choice about it. The language of the court was that "although white flight cannot be the reason for failure to dismantle a dual school system, it can be considered in devising a voluntary plan to improve racial balance of the schools."[35] Subsequently, several other districts have gained unitary status. Among them are DeKalb County (Georgia) and Dallas (Texas). In the latter case, Judge "Barefoot" Sanders kept the district on probation for three years before providing full unitary status. Still, there is racial strife within the districts and in the case of Dallas, within the membership of the school board.

As more and more districts are released from court jurisdiction, there is a return in many of those districts to the concept of neighborhood schools and freedom of choice. Courts do not seem to be intervening in these cases. It is clear, however, that issues relative to desegregation continue to exist even in the face of significant changes in the philosophy of the courts away from freedom of choice and back toward it.

Endnotes

1. Green v. County School Board of New Kent County, 391 U.S. 430, 1968
2. Swann v. Charlotte-Mecklenberg Board of Education, 410 U.S. 1, 1970
3. Wright v. City Council of Emporia, 407 U.S. 451, 1972

4. Keyes v. School District No. 1, 413 U.S. 189, 1973
5. Ibid.
6. Alexander, K., & Alexander, M.D. (1985). *The American Public School Law* (2nd ed.). St. Paul: West Publishing Company, pp. 405-406.
7. Ibid.
8. Ibid.
9. Ibid.
10. Ibid.
11. Ibid. , p. 408
12. Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483, 1954, at 495
13. Brown v. Board of Education of Topeka, 349 U.S. 294, 1955, at 301.
14. It was widely assumed in the late 1950s and early 1960s that choice would desegregate the schools. It did not in most districts, however, because both black and white parents were reluctant to send their children to schools that had formerly been populated by the opposite race.
15. Parkinson, H.J. (1991). *The Imperfect Panacea: American Faith in Education, 1865-1900* (3rd ed.). New York: McGraw-Hill, p. 60.
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17. Ibid.
18. Spring, J. (1993). *Conflict of Interests: The Politics of American Education* (2nd ed.). New York: Longman, p. 97.
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20. Green v. County School Board of New Kent County, 391 U.S. 430, 1968, at 438.
21. Ibid., at 436.
22. Swann V. Charlotte-Mecklenberg Board of Education, 401 U.S. 1., 1970, at 16.
23. Ibid., at 24.
24. Ibid., at 24.
25. Ibid., at 29-31.
26. North Carolina State Board of Education v. Swann, 402 U.S. 43, 1970, at 45.
27. Webb, L. D., Metha, A., & Jordan, K.F. (1996). *Foundations of American Education* (2nd ed.). Englewood Cliffs, NJ: Merrill, p. 303.
28. Alexander, et al., p. 423.
29. Milliken v. Bradley, p. 742.
30. Spangler v. Pasadena, 611 F2d. 1239, p. 1245.
31. Milliken v. Bradley (II), 433 U.S. 267, 1977
32. Ibid., p. 276.
33. Arthur v. Nyquist, 712 F2d. 809, 1983, p. 812.
34. Greenville County, 607 F. Supp. 289, 1985, p. 291.
35. Riddick by Riddick, 784 F2d. 521, 1986, pp. 528-529.

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EVERYTHING YOU NEED TO KNOW ABOUT DISCIPLINE OF STUDENTS WITH DISABILITIES

PART I - DISCIPLINARY REMOVALS/EXCLUSIONS OF DISABLED STUDENTS

By: David T. Duff

Presentation for Annual Conference of the Education Law Association
Charleston, SC — November 1998

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EVERYTHING YOU NEED TO KNOW ABOUT DISCIPLINE OF STUDENTS WITH DISABILITIES
PART I - DISCIPLINARY REMOVALS/EXCLUSIONS OF DISABLED STUDENTS

By: David T. Duff

I. Sources of Law

  A. Individuals with Disabilities Education Act Amendments of 1997, Public Law 105-17 (IDEA), 20 U.S.C. § 1400 et seq.

    1. OSEP Memorandum 95-16, 22 IDELR 531 (1995) (good summary of discipline procedures under IDEA before 1997 Amendments).

    2. OSEP Memorandum 97-7, 26 IDELR 981 (Sept. 19, 1997) (non-binding/non-regulatory guidance re: short-term suspensions).

    3. Proposed amended IDEA regulations, 34 C.F.R. Part 300, 62 Fed. Reg. 55025-135 (Oct. 22, 1997).

  B. Section 504 of Rehabilitation Act of 1973, 29 U.S.C. § 794, and implementing regulations, 34 C.F.R. Part 104.

II. "Suspension" (up to 10-day removal)

  A. School personnel may suspend a child with a disability for not more than 10 school days. 20 U.S.C. §1415(k)(1)(A)(i).

  B. 10 days "per offense" or "per school year"?

    1. Statute is not clear.

    2. Proposed regulations say "per school year." Proposed reg. 34 C.F.R. § 300.520(c).

    3. But see note 1 to proposed § 300.520: "A series of removals from a child's current educational placement in a school year each of which is less than 10 school days but cumulate to more than 10 school days in a school year may constitute a change in placement, if, in any given case, the factors such as the length of each removal, the total amount of time that the child is removed,

and the proximity of the removals to one another, lead to the conclusion the child has been excluded from the current placement to such an extent that there has been a change of placement."

C. Can educational services cease?

1. Statute appears to say "no"--§1412(a)(1)(A) (FAPE is to be provided to all disabled students "including [those] who have been suspended or expelled from school").

2. U.S. Department of Education says "yes"--OSEP Memorandum 97-7, 26 IDELR 981; proposed reg. § 300.520(a)(1).

D. School need not conduct a "functional behavioral assessment" or implement a "behavioral intervention plan." § 1415(k)(i)(B)(ii); proposed reg. § 300.520(c).

E. School need not conduct a "manifestation determination." Proposed reg. § 300.523(b). But see §1415(k)(4)(A) (language of statute can be read to require manifestation determination even for a removal of less than 10 days).

III. 45-Day Removal for Weapons And Illegal Drugs

A. School personnel unilaterally may remove a disabled child from his/her regular placement to an appropriate "interim alternative educational setting" for up to 45 calendar days when the child—

1. Carries a "weapon" to school or to a school function.

a. "Weapon" means "dangerous weapon" as defined in 18 U.S.C. § 930(g)(2). § 1415(10)(D)

b. "Weapon" therefore means "a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is regularly capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2½ inches in length."

2. Knowingly possesses or uses "illegal drugs" or sells or solicits the sale of a "controlled substance" while at school or at a school function.

a. "Illegal drug" means a "controlled substance" but does not include such a substance that is "legally possessed or used under any other authority under [the Controlled Substances] Act or under any provision of Federal law." § 1415(10(i)-(ii)

b. Illegal drugs include, among others, heroine, morphine, marijuana, and amphetamines.

c. Illegal drugs does not include individually prescribed medications.

§ 1415(k)(1)(A)(ii)(I)-(II); proposed reg. § 300.520(a)(2)(i)-(ii)

B. Although the statute is not absolutely clear, the better reading of the Amended IDEA is that a district can first suspend a child with a disability for 10 days and, after that 10-day period has run, initiate the 45-day removal. See § 1415(k)(1)(A) and the use of the word "and" between (i) and (ii).

C. "Interim alternative educational setting" (IAES) is to be determined by the IEP Team and must be selected to enable the child to—

1. Participate in the general curriculum, although in another setting.

2. Continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP.

3. And must include services and modifications designed to ensure that the behavior does not recur.

§ 1415(k)(3)(A)-(B); proposed reg. § 300.522(a)-(b)

4. Case decisions

a. In Re: Student with a disability, 27 IDELR 935 (SEA Ind. 1998) (among other things, the hearing officer ruled that principal was not authorized to assign the student to an IAES; under IDEA 1997 this decision belongs to the IEP team)

b. Oregon City Sch. Dist., 28 IDELR 1996 (SEA Ore. 1998) (hearing officer ruled that, although student was able to take part in the general curriculum, home placement was not appropriate as an IAES because it did not allow the student to work on his IEP goals as a result of the district's failure to provide the student with the psychological, counseling, and social behavioral services called for in the IEP)

D. Not later than 10 days after removing the child to an IAES, if the district has not conducted a functional behavioral assessment (FBA) and implemented a behavioral intervention plan (BIP) for the child before the behavior that resulted in the disciplinary action occurred, the district must convene an IEP meeting to develop an assessment plan. If a behavior intervention plan already was in place, the IEP team must review the plan and, if necessary, modify it to address the behavior. § 1415(k)(1)(B)(i)-(ii)

1. Proposed reg. § 300.520, Note 2: Although districts are not required to conduct an FBA and develop a BIP for removals of less than 10 days, districts are encouraged to "review as soon as possible the circumstances surrounding the behavior that lead to the child's removal and consider . . . whether the behavior could be addressed through minor classroom or program adjustments or whether the child's IEP team should be reconvened to address possible changes in that document."

2. As a practical and legal matter, because of the requirement that a manifestation determination be made, which, among other things, obligates the district to determine whether behavior intervention strategies were provided, it may not be possible to utilize the 45-day removal without a prior FBA and BIP.

E. "Manifestation Determination": The IDEA Amendments of 1997 require that a review be conducted of the relationship between the child's disability and the behavior subject to disciplinary action ("manifestation determination") no later than 10 school days after the decision to change a student's placement for disciplinary reasons; therefore, all 45-day removals require a manifestation determination. § 1415(k)(4)(A)(ii); proposed reg. § 300.523(a)(2).

1. A manifestation determination must be conducted by the child's IEP team, including the students' parents, and other qualified personnel. § 1415(k)(4)(B); proposed reg. § 300.523(c).

2. In making the relationship determination, the IEP team must consider, in terms of the behavior subject to the disciplinary action, all relevant information, including—

   a. Evaluation and diagnostic results, including such results or other relevant information supplied by the parents

   b. Observations of the child

   c. The child's IEP and placement

§ 1415(k)(4)(C)(i); proposed reg. § 300.523(d)(1)

3. The IEP team may then determine that the behavior of the child is not a manifestation of the child's disability only if the team concludes that—

    a. In relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consist with the child's IEP and placement.

    b. The child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action.

    c. The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

§ 1415(k)(4)(C)(ii); proposed reg. § 300.523(d)(2)

4. Case decisions--

    a. Williams S. Hart Union High Sch. Dist., 26 IDELR 1258 (SEA Cal. 1997) (hearing officer ended IAES and returned learning disabled student who was found smoking marijuana off campus to his regular placement because no manifestation determination was performed; also no FBA/BIP was conducted)

    a. Oconee County Sch. Sys., 27 IDELR 629 (SEA Ga. 1997) (purporting to apply the new manifestation requirements, hearing officer upholds the district's finding that the conduct of an OHI/ADHD student in bringing a firearm to school was not a manifestation of the student's disorder since the act was the result of poor judgment and not impulsivity)

5. A logical reading of paragraphs (1)-(2) of § 1415(k) with paragraphs (5) and (7), along with prior case law, e.g., Honig v. Doe 484 U.S. 305 (1988), supports the conclusion that removal for (the full) 45 days is permissible when the misbehavior is a manifestation of the disability. But see proposed reg. § 300.523, Note 2: "If the result of the manifestation determination is that the behavior is a manifestation of the child's disability, the [district] must take immediate steps to remedy any deficiencies found in the child's IEP or placement, or their implementation. For a child who has been placed in a 45-

day placement . . . and for whom the child's behavior is subject to discipline is a manifestation of a child's disability, these remedies often should enable a child to return to the child's current educational placement before the expiration of the 45-day period."

6. If the result of the IEP team's review is a determination that the behavior of the child was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities except that a free appropriate public education (FAPE) must be made available. § 1415(k)(5)(A); proposed reg. § 300.524(a). Presumably, in the case of a 45-day removal, this means that the child may remain in the IAES for the entire period.

7. If the parent of a disabled child disagrees with a determination that the child's behavior was not a manifestation of the child's disability (or with any aspect of the IAES), the parent may request a hearing, which must be expedited. § 1415(k)(6)(A); proposed reg. § 300.525(a).

   a. In reviewing the decision with respect to the manifestation determination, the hearing officer must determine whether the district has demonstrated that the child's behavior was not a manifestation of the child's disability consistent with the factors set forth in III.D.2 and III.D.3 above.§ 1415(k)(6)(B)(i); proposed reg. § 300.525(b)(1). (In reviewing the appropriateness of the IAES, the hearing officer shall apply the standards set forth in III.B. above. § 1415(k)(6)(B)(ii); proposed reg. § 300.525(b)(2).)

   b. When a parent requests a hearing to challenge the manifestation determination (or the IAES), the child should remain in the IAES pending the hearing officer's decision or until the expiration of the 45-day period whichever occurs first, unless the district and the parent agree otherwise. § 1415(k)(7)(A); proposed reg. § 300.526(a).

IV. 45-Day Exclusion of "Dangerous Student"

A. School officials may seek an order from a due process hearing officer authorizing a 45-calendar day exclusion to an IAES if the hearing officer—

1. Determines that the district has demonstrated by "substantial evidence" that maintaining the current placement is "substantially likely to result in injury to the child or others."

2. Considers the appropriateness of the child's current placement.

3. Considers whether the district has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services.

4. Determines that the IAES meets the requirements set forth in III.A.b. above.

§ 1415(k)(2); proposed reg. § 300.521(a)-(e)

5. The term "substantial evidence" is defined as meaning "beyond a preponderance of the evidence."

§ 1415(k)(10)(C); proposed reg. § 300.521(e)

B. The FBA/BIP and manifestation determination requirements set forth in III.C. and III.D. above also must be satisfied.

C. Case decisions--pre-1997 Amendments law

1. Light v. Parkway C-2 Sch. Dist., 41 F.3d 1223, 21 IDELR 933 (8th Cir. 1994), cert. denied, 515 U.S. 1132 (1995) (student who engaged in an average of 15 violent acts a week, 30 of which resulted in need for medical attention could be excluded because maintaining the child in the current placement was substantially likely to result in injury to the child or others, and district had done all it could do reasonably to reduce the risk that the child would cause injury)

2. Phoenixville Area Sch. Dist. v. Marquis B., 25 IDELR 452 (E.D. Pa. 1997) (learning disabled sixth grader had engaged in six incidents on four dates over a five-month period, three of which involved physical touching, including hitting other students and shoving the principal against the wall; court denied injunctive relief noting that the school had not elaborated on what preventative or ameliorative measures had been attempted and concluded that the factual allegations did not rise to level of demonstrating a substantial likelihood of injury)

V. "Expulsion" (exclusion for more than 10 days and not a 45-day removal)

A. Under § 1415(k)(5)(A), if the result of the IEP team's review is a determination that the behavior of the child was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except that FAPE must be made available.

B. This means that, if non-disabled students may be expelled for the same rules infraction, a disabled student may be "expelled" when the misconduct is not related to his or her disability, but the disabled student continues to be entitled to receive FAPE throughout the term of the expulsion.

C. Query: It appears clear that a manifestation determination must be conducted before any "expulsion" for any reason can take place (§ 1415(k)(4)(A)); however, the Amended IDEA arguably may be read not to require a FBA/BIP in cases of "expulsion" for reasons other than possession or use of weapons or drugs, or when the student has engaged in dangerous behavior. See § 1415(k)(1)(B).

VI. Protections For Children Not Yet Eligible For Special Education Related Services

A. A child who has not been determined to be eligible for special education and related services and who has engaged in behavior that violated any rule or code of conduct of the district, may assert any of the protections of the Amended IDEA if the district "had knowledge" that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. § 1415(k)(8)(A); proposed reg. § 300.527(a)

B. A district is deemed to have knowledge that a child is a child with a disability if—

1. The parent of the child has expressed concern in writing (unless the parent is illiterate or has a disability that prevents it) to personnel of the district that the child is in need of special education and related services.

2. The behavioral performance of the child demonstrates the need for such services.

3. The parent of the child has requested an evaluation under the IDEA.

4. The teacher of the child, or other personnel of the district, has expressed concern about the behavior or performance of the child to the district director of special education or to other personnel of the district.

§ 1415(k)(8)(B); proposed reg. § 300.527(b)

C. If the district does not have knowledge that a child is a child with a disability prior to taking disciplinary measures against the child—

1. The child may be subjected to the same disciplinary measures as those applied to children without disabilities who engaged in comparable behaviors.

2. If a request is made for an evaluation of the child during the time period in which the child is subjected to disciplinary measures, the evaluation must be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the district and information provided by the parent, the district shall provide special education and related services in accordance with the IDEA, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

§ 1415(k)(8)(C); proposed reg. § 300.527(c)

EVERYTHING YOU NEED TO KNOW ABOUT DISCIPLINE OF STUDENTS WITH DISABILITIES

Session A.2

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Making the Manifestation Determination

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WHO MAKES THE MANIFESTATION DETERMINATION?

- § 1415(k)(4)(B) states that the manifestation review "shall be conducted by the IEP Team and other qualified personnel."[1] Prior to the 1997 amendments courts had stated that this decision was to be made by a knowledgeable group of persons.[2]

- Thus, the manifestation review should be completed by the same team that is responsible for developing the student's IEP. The student's parents should be included. Other personnel could include a guidance counselor, administrator, teachers, or anyone else with knowledge of the child's behavior and/or disability.[3]

WHEN MUST THE MANIFESTATION DECISION BE MADE?

- § 1415(k)(4)(A)(ii) states that the review shall be conducted no later than

10 schools days after the date when the decision was made to take disciplinary action.[4]

- The manifestation decision should be made as soon as possible following the misbehavior in question.[5]
- The manifestation determination is also required by section 504; thus, students who are not eligible for special education and related services under the IDEA, but are entitled to the protections of section 504 are still entitled to have a manifestation determination prior to any long-term suspension or expulsion.[6]

WHAT FACTORS SHOULD BE CONSIDERED IN MAKING THE MANIFESTATION DECISION?

- § 1415(k)(4)(C) provides that the team must consider all relevant information such as evaluation and diagnostic data, including information supplied by the parents, information obtained from observations of the student, and the student's IEP and placement.[7]
- Furthermore, the team must determine

    (1)whether the student's disability impairs the student's ability to understand the impact and consequences of the misconduct,[8] and

    (2) whether the student's disability impairs his or her ability to control behavior.[9]

QUESTIONS TO ASK IN MAKING THE MANIFESTATION DETERMINATION

What is the student's disability classification?

- Identification and classification of the student as *emotionally disturbed, behaviorally disordered,* or some similar label, provide support for the contention that an act of misconduct may be a manifestation of the student's disability.
- However, the manifestation determination may not be based solely on the student's disability classification alone.[10] The fact that a student is classified as emotionally disturbed or behaviorally disordered does not mean that the student is unable to obey school rules or control behavior. Similarly, the fact that a student has not been categorized as emotionally disturbed or behaviorally disordered does not mean that the misconduct is unrelated to the disability.
    - For example, students with cognitive impairments may not fully comprehend why certain behaviors are not acceptable.
- Consideration must be given to whether or not the student's disability either prevented the student from knowing that the behavior was inappropriate, limited the student's understanding of the consequences of the behavior, or impaired the student's ability to control the behavior.

What does the student's IEP say about the student's behavior?

- Information in the student's IEP may provide some indication as to whether or not the student's disability could cause the student to misbehave. For example, statements that the student suffers from poor self-esteem, does not understand cause and effect relationships, acts impulsively, or has low frustration tolerance could infer that under certain situations, the student's misconduct could be connected to the disability. Naturally, a more direct statement such as, "At times the student has difficulty following school rules" would provide stronger evidence of a causal connection.

- If the student's IEP includes goals and objectives related to behavior, this may further indicate that there is a possible nexus between the disability and misconduct. The IEP may also supply information about past behaviors and the context in which misbehavior may occur.

What information does recent evaluation data provide about the student?

- Evaluation data, particularly psychological data, will be helpful in making the manifestation determination.
  - If the evaluation data indicates that the student has a propensity to be disruptive, becomes easily angered, or may lash out when feeling threatened, misconduct can be predicted.
  - Additionally, evaluation data may provide information that a student has poor impulse control, doesn't fully understand the consequences of his or her behavior, doesn't know right from wrong, etc.
- This information can provide valuable clues as to whether or not there is a relationship between the student's disability and misconduct.
  - For example, a student with poor impulse control may act without regard for the consequences of the misbehavior.
- Evaluation data should be current so that it relates to the student's present situation.
- An observation of the student in the environment in which the misbehavior occurred would also provide context-specific information.

Does the student have a history of misconduct?

- Is the current misconduct part of a pattern of misbehavior or is it an isolated incident? An act of misconduct that is part of a pattern is more likely to be an indication of disability-related behavior than is a single isolated incident. Generally students with a history of misbehavior have IEPs that address this issue.

What situational factors may have contributed to the misbehavior?

- Students may behave differently in different situations and different environments. An examination of the situation that led to the act of misconduct may provide much insight concerning a possible relationship between the misconduct and the student's disability.
- Consideration should be given to how the student's disability may have affected the student's judgment in this situation or interpretation of the events that led to the behavioral incident.
    - For example, learning disabled students may misinterpret a social situation and act inappropriately because of their inability to correctly assess the situation.

NEXT STEPS

- If a relationship exists, the student may not be expelled or excluded for more than ten days.
- If the team determines that behavior was not a manifestation of the student's disability, the student may be disciplined in the same manner as nondisabled students.

- If the parents disagree with the manifestation decision, they may request a hearing; they are entitled to an expedited hearing

ENDNOTES

1. 20 U.S.C. § 1415(k)(4)(B). *Also see* Proposed Rules § 300523(c), 62 Fed. Reg. 55025, 55103 (Oct. 22, 1997).

2. *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981). *Also see* OCR Memorandum: Suspensions of Handicapped Students - Deciding Whether Misbehavior Is Caused By A Child's Handicapping Condition, 16 EHLR 491 (OCR 1989). Note: While this memorandum is directed primarily toward manifestation determinations under section 504, it has implications for the implementation of the IDEA provisions as well.

3. It is not appropriate for the manifestation decision to be made by a school board, a subcommittee of the school board, or a single administrator such as the superintendent. Case Letter, 22 IDELR 370 (OSEP 1994). *S-1 v. Turlington, supra* n. 2.

4. 20 U.S.C. § 1415(k)(4)(A)(*ii*). *Also see* Proposed Rules § 300.353(b), 62 Fed. Reg. 55025, 55103 (Oct. 22, 1997).

5. The burden clearly is on the school district to raise the question of whether the misconduct is a manifestation of the student's disability. *S-1 v. Turlington, supra* n. 2.

6. *See e.g. St. Mary's Area Sch. Dist.*, 16 EHLR 1156 (OCR 1990).

7. 20 U.S.C. § 1415(k)(4)(C). *Also see* Proposed Rules § 300.523(d)(i), 62 Fed. Reg. 55025, 55103 (Oct. 22, 1997).

8. Proposed Rules § 300.523(d)(2)(ii), 62 Fed. Reg. 55025, 55103 (Oct. 22, 1997).

9. Proposed Rules § 300.523(d)(2)(iii), 62 Fed. Reg. 55025, 55103 (Oct. 22, 1997).

10. David Dagley, Michelle McGuire, and Charles Evans, *The Relationship Test in the Discipline of Disabled Students*, 88 Ed.Law Rep. [13] (1994). For a recent decision on point *see J.B. v. Independent Sch. Dist. No. 191, Burnsville, Minn.*, 21 IDELR 1157 (D. Minn. 1995).

EVERYTHING YOU NEED TO KNOW ABOUT DISCIPLINE OF STUDENTS WITH DISABILITIES

PART II - AVERSIVES

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Electric Shock

+ Northville Pub. Sch., 16 EHLR 847 (Mich. SEA 1990) - SIBIS not permissible except after exhausting less restrictive approaches

+ Salinas Union High Sch. Dist., 22 IDELR 301 (Cal. SEA 1995) - SIBIS was not a necessary related service in this case

(-) VanDuser v. Intermediate Sch. Bd., 16 EHLR 1341 (E.D. Mich. 1990) - court-approved consent decree agreeing to SIBIS in child's IEP and consultant for recommended procedures

Noxious Substances

+ Behavior Research Inst. v. Leonard, EHLR 557:402 (Mass. P & Fam. Ct. 1986) - preliminary injunction that had the effect of allowing taste aversives and other such therapy in restricted setting

+ Salina (KS) Unified Sch. Dist. No. 305, EHLR 352:254 (OCR 1986) - use of alum to modify vulgar language did not violate § 504 where approved in IEP process

+ Oakley (KS) Unified Sch. Dist., 24 IDELR 393 (OCR 1995) - no § 504 violation where lack of evidence that teacher fed child red pepper

+ James v. Trumbull County Bd. of Educ., 663 N.E.2d 1361 (Ohio Ct. App. 1995) - reversed the termination of a teacher who used various aversive techniques, including hot sauce to curb pica

Corporal Punishment

+ Missouri Sch. for the Deaf, EHLR 257:99 (OCR 1980) - no violation of § 504 where no evidence of physical abuse or violation of state statute

- Manor Indep. Sch. Dist., EHLR 504:109 (Tex. SEA 1982) - paddling and slapping ED child violated IDEA where not in IEP and not proven beneficial

- Winston County (AL) Sch. Dist. EHLR 352:76 (OCR 1985); Nash County (NC) Sch. Dist., EHLR 352:37 (OCR 1985); Lower Snoqualmie Valley (WA) Sch. Dist., EHLR 257:149 (OCR 1980); Central Valley (WA) Sch. Dist. No. 410, EHLR 257:166 (OCR 1979) - paddling/spanking violated § 504 where failure to consider relationship to child's disability

+ Cole v. Greenfield-Cent. Community Sch. Dist., 667 F. Supp. 56 (S.D. Ind. 1986) - non-excessive paddling and symbolic taping of ED student did not violate Am. XIV (SDP, PDP, EP)

(+) Waterman v. Marquette-Alger Intermediate Sch. Dist., 739 F. Supp. 361 (W.D. Mich. 1990) - dismissed IDEA and § 504 claims for lack of exhaustion of due process mechanism

+ Fee v. Herndon, 900 F.2d 804 (5th Cir. 1990), cert. denied, 498 U.S. 908 (1990) - no violation of Am. XIV SDP

(-) Haley v. McManus, 18 IDELR 815 (La. Ct. App. 1991) - upheld reduced damages award for ADD student who was corporally punished with a belt

+ Crenshaw County (AL) Sch. Dist., 20 IDLER 986 (OCR 1993) - no § 504 violation where lack of disparate treatment

+ Orange (CA) Unified Sch. Dist., 20 IDELR 770 (OCR 1993); Cocke County (TN) Sch. Dist. EHLR 353:169 (OCR 1988) - no § 504 violation where unrelated to child's disability

- West Las Vegas (NM) Sch. Dist., 20 IDELR 1358 (OCR 1993) - violation of § 504 where IEP expressly dictated other measures

+ Laughlin v. Central Bucks Sch. Dist., 20 IDELR 894 (Pa. Commw. Ct. 1994) -no violation of IDEA or state special ed regs where tangential

(+) Pullen v. Botetourt County Sch. Bd., 23 IDELR 607 (W.D. Va. 1995) - dismissed IDEA, § 504, and constitutional claims due to failure to exhaust

+ White Settlement Indep. Sch. Dist., 24 IDELR 479 (Tex. SEA 1996) - no IDEA violation due to lack of evidentiary support

+ Dixfield (ME) Pub. Sch., 25 IDELR 762 (OCR 1996); School Administrative Unit No. 4 (NH), 16 EHLR 1282 (OCR 1990) - no § 504 violation where lack of evidentiary support

+ Gaither v. Barron, 924 F. Supp. 134 (M.D. Ala. 1996) - no violation of Am. XIV SDP and, in absence of evidence of connection to child's disability, § 504 and ADA

+ T.J.W. v. Dothan City Bd. of Educ., 26 IDELR 999 (M.D. Ala. 1997) - no violation of Am. XIV and tort law claims

(-) Mobile County Bd. of Educ., 26 IDELR 947 (Ala. SEA 1997) - corporal punishment violated IDEA but hearing officer was w/o authority to award money damages

+ Tall v. Board of Sch. Comm'rs, 28 IDELR 151 (Md. Ct. Spec. App. 1998) - school district was not liable for teacher's corporal punishment of student with Down syndrome since it was outside his scope of employment

Restraints

+ Garland Indep. Sch. Dist. v. Wilks, 657 F. Supp. 1163 (N.D. Tex. 1987) - physical restraint was not so excessive as to violate Am. XIV SDP

(+) cf. Jefferson v. Ysleta Indep. Sch. Dist., 817 F.2d 303 (5th Cir. 1987) - tying nondisabled student to chair for two days could violate Am. XIV SDP

+ Florence County (SC) Sch. Dist. No. 1, EHLR 352:495 (OCR 1987) - physical restraint did not violate § 504 where necessary even though not in conformity with IEP

- Portland (ME) Sch. Dist., EHLR 352:492 (OCR 1987) - strapping student to wheelchair tethered to radiator violated § 504 where not in IEP and unjustifiably restrictive

+ Wells-Ogunquit (ME) Community Sch. Dist., 17 IDELR 495 (OCR 1990); Ohio County (WV) Pub. Sch., 16 EHLR 1619 (OCR 1989) - physical restraints did not violate § 504 where single incidents in line with child's IEP

+ Department of Human Serv. Div. of Developmental Disabilities, 16 EHLR 842 (N.J. SEA 1990) - self-protective velcro strap violated state regulations

- Oakland (CA) Unified Sch. Dist., 20 IDELR 1338 (OCR 1993); Marshall County (KY) Sch. Dist., 20 IDELR 556 (OCR 1993) - mouth taping violated § 504 where related to child's disability

- Chicago (IL) Pub. Sch., 20 IDELR 699 (OCR 1993) - tying students violated § 504 and ADA w/o IEP team's consideration of relevant evaluation data

+ Aiken County (SC) Sch. Dist., 23 IDELR 113 (OCR 1995) - mouth taping did not violate § 504 where no disparate treatment and prompt reassignment

+ Gateway (CA) Unified Sch. Dist., 24 IDELR 80 (OCR 1995) - isolated incident did not violate § 504 where in accordance with IEP

+ Sylvester v. Cancienne, 664 So.2d 1259 (La. Ct. App. 1995), cert. denied, 666 So.2d 663 (La. 1996) - upheld demotion of principal for tying child to desk with rope and binding wrists and ankles with duct tape[1]

- James v. Trumbull County Bd. of Educ., 663 N.E.2d 1361 (Ohio Ct. App. 1995) - reversed termination of special ed teacher who used varied aversive techniques including facial screening

+ Heidemann v. Rother, 84 F.3d 1021 (8th Cir. 1996) - blanket wrapping technique did not violate Am. XIV SDP, § 504, or IDEA

+ White Settlement Indep. Sch. Dist., 24 IDELR 479 (Tex. SEA 1996) - use of special wooden tray chair did not violate IDEA where within limitations of IEP

+ Cobb County Sch., 24 IDELR 1113 (Ga. SEA 1996) - no violation of IDEA where lack of evidentiary support (re another special chair)

(-) Ronnie L. v Mingo County Bd. of Educ., 500 S.E.2d 292 (W. Va. 1997) - not subject to exhaustion where settlement agreement was in lieu of due process hearing

Time Out

+ Sanger (CA) Unified Sch. Dist., EHLR 257:02 (OCR 1978) - not violation of § 504 where reasonable procedures and limits

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[1] For a similar result for a nurse who was terminated for giving a disruptive child a cold shower to calm her down, see Juneau of Louisiana Bd. of Elementary and Secondary Educ., 506 S.E.2d 756 (La. Ct. App. 1987).

+ In re Kristen M., EHLR 501:283 (Tex. SEA 1983) - - not violation of IDEA where in accordance with IEP

- Illinois Case No. SE-22-83, EHLR 505:107 (Ill. SEA 1983) - violation of IDEA where clearly exceeded accepted standards

- Baltimore City Pub. Sch., EHLR 508:117 (Md. SEA 1986) - ordered district to promptly proceed with time-out procedure within guidelines

- In re Danielle S., EHLR 509:142 (Pa. SEA 1987) - locked time-out box violated state regs

(+) Hayes v. Unified Sch. Dist. No. 377, 877 F.2d 809 (8th Cir. 1989) - subject to exhaustion

+ Norris v. Board of Educ., 797 F. Supp. 1452 (S.D. Ind. 1992) - subject to exhaustion and not IIED

(-) Gerks v. Deathe, 832 F. Supp. 1450 (W.D. Okla. 1993) - possible liability under Am. XIV SDP and tort law (e.g., false imprisonment)

+/(-) Rasmus v. State of Arizona, 939 F. Supp. 709 (D. Ariz. 1996) - possible violation of Am. IV, but not Am. XIV SDP, ADA, or state tort law

(-) Orange v. County of Grundy, 950 F. Supp. 1365 (E.D. Tenn. 1996) - - possible violation of Am. XIV PDP or SDP

+ Robert H. v. Nixa R-2 Sch. Dist., 26 IDELR 564 (W.D. Mo. 1997) - not violation of IDEA, §504, ADA, or Am. XIV SDP

- State v. Pagano, 669 A.2d 1339 (Md. 1996) - rejected criminal charge of obstruction of justice of teacher lied and told aides to lie about time-out incident

+ Boerne Indep. Sch. Dist., 25 IDELR 102 (Tex. SEA 1996) - no violation of IDEA where prudent use as last resort

+ Marion County (FL) Sch. Dist., 20 IDELR 634 (OCR 1993) - no § 504 violation where in accordance with IEP and accepted standards

+ Northwest (MO) R-1 Sch. Dist., 24 IDELR 1193 (OCR 1996); Asheville City (NC) Sch. System, 25 IDELR 155 (OCR 1996); cf. Pueblo (CO) Sch. Dist.. 20 IDELR 1066 (OCR 1993) - no § 504 violation where lack of evidence

LAW AND PRACTICE: THE TESTING AND ASSESSMENT OF INDIVIDUALS WITH DISABILITIES:

November 19, 1998

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Overview

- Social policy goals of nondiscrimination and full inclusion of individuals with disabilities in all aspects of our economic, social, and political life.
- Education policy goals of individualized decision-making and full participation in education reform initiatives.
- Legal provisions designed to eliminate discrimination on the basis of disabilities.
- Reconciling law and practice in two problem areas: admissions testing and participation in education reform initiatives.
- Professional standards of practice for testing require that tests used to inform important educational or employment decisions must be offered with reasonable accommodations, be valid and reliable, and be reported appropriately. Is this lawful?

Federal Disability Rights Statutes

- Section 504 of the Rehabilitation Act of 1973 provides:

> "No otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ."' 29 U.S.C. § 794(a).
> (see Alexander v. Choate, 469 U.S. 287, 301, 105 S. Ct. 712, 720 (1985).

The provisions of Section 504 and its implementing regulations are designed to ensure equal opportunities for persons with disabilities to "benefit" from educational programs and activities and to participate in employment and other life activities without discrimination. Under these regulations, for example, it is, a prohibited discriminatory practice for public school systems, on the basis of disability, to:

> "(i) [d]eny a qualified handicapped person the opportunity to participate in or benefit from . . . [an] aid, benefit or service; (ii) [a]fford a qualified handicapped person an opportunity to participate in or benefit from . . . [an] aid, benefit, or service that is not equal to that afforded others; (iii) [p]rovide a qualified handicapped person with an aid, benefit or service that is not as effective as that provided to others; [or] (iv) [p]rovide different or separate aid, benefits or services to any handicapped person or to any class of handicapped person unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others." 34 C.F.R. § 104.4(b)(1) .

To meet the requirement in the regulations that programs and services for persons with disabilities be equally effective compared to those received by others, an aid, benefit or service "must . . . afford [disabled] persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement . . . ." 34 C.F.R. § 104.4(b)(2). Routinely excluding students with disabilities from testing or assessment programs would violate their rights under §504 to receive the same benefits and services provided non-disabled students. On the other hand, simply allowing all individuals with disabilities to participate in testing or assessment in the same way as persons without disabilities presents opportunities for other forms of discrimination.

Reasonable accommodations in testing or assessment will be required and must be individually determined for each examinee seeking an accommodation. And, in the absence of evidence from a testing program to rebut it, courts may rely upon a treating physician for an examinee with a disability to determine the nature of a reasonable testing accommodation (D'Amico v. New York State Board of Law Examiners, 1993).

One federal appellate court formulated the following test to determine whether an educational institution has met its obligation of providing reasonable testing accommodations under Section 504:

> If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable

conclusion that the available alternatives would result either in lowering academic standards or require substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation (Wynne v. Tufts University School of Medicine, 1991932 F. 2d. 19 (1st Cir. 1991, aff'd 976 F. 2d 791 (1992).

See also OCR decisions in Hawaii State Dep't of Educ., 17 EHLR 360 (OCR Oct. 11, 1990); State Dep't of Educ. (GA), EHLR 352:480 (OCR 6/26/87); South Carolina Dep't of Educ., EHLR 352:475 (OCR 6/23/87).

- The Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (ADA), expressly prohibits public institutions and private entities providing public accommodations and services from "[p]rovid[ing] different or separate aids, benefits or services [to persons with disabilities] that are not as effective as those provided to others." Title II of the ADA prohibits any State, school district or school from excluding from participation, denying benefits, aids, or services, or otherwise discriminating against a qualified individual with a disability, on the basis of his or her disability (42 U.S.C. § 12131 et seq.). Title III of the law governs "public accommodations and services operated by private entities" (42 U.S.C. 12181-12189).

The ADA includes a specific provision governing examinations:

> "Any person that offers examinations or courses related
> to applications, licensing, certification, or credentialing
> for secondary or post-secondary education, professional,
> or trade purposes shall offer such examinations or courses
> in a place and manner accessible to persons with disabilities
> or offer alternative accessible arrangements for
> such individuals." (42 U.S.C. 12189)

The DOJ regulations under the ADA also provide that a private entity offering an examination relating to application to a postsecondary educational program must ensure that:

> "[t]he examination is selected and administered so as to best ensure that, when the examination is administered to an individual with a disability . . . , the examination results accurately reflect the individual's aptitude or achievement . . . rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure)." [Furthermore, there must be assurance that such an examination] "is offered at equally convenient locations, as often, and in as timely a manner as are other examinations," and that "[t]he examination is administered in facilities that are accessible to individuals with disabilities or alternative accessible arrangements are made" (28 C.F.R. 36, 1996).

Selection Testing for Higher Education Admissions

A technical guidance manual produced in 1978 under a contract from the U.S. Department of Education Office of Civil Rights (OCR) to address the question of notifying institutions of nonstandard administrations of admissions tests for students with disabilities states:

> Until such time as a more viable policy can be worked out, the testing services will be allowed to continue to notify their users that tests were taken under non-standard conditions. This is an interim policy only. OCR recognizes that this procedure may violate the prohibition against preadmission inquiry; it will be allowed only until the interim policy can be modified, and OCR suggests that recipients be prepared to modify their admissions requirements in the future (American Association of Collegiate Registrars and Admissions Officers & American Council on Education, 1978) (emphasis original).

See subsequent OCR decisions (University of Michigan, 2 Nat'l Disab. L. Rep. (LRP Publications) 302 (Oct. 18, 1991); (SUNY Health Science Ctr. at Brooklyn-College of Medicine (NY), 5 Nat'l Disab. L. Rep. (LRP Publications) 77 (Aug. 18, 1993).

Accountability Testing in Elementary and Secondary Schools

- The Goals 2000 Educate America Act (20 U.S.C. 5801 et seq.) and the Improving America's Schools Act (Pub. L. No. 103-382, 108 Stat. 3518) embody the principles that all children can learn and achieve to high standards and that all students are entitled to participate in a broad and challenging curriculum. require participating States to develop and implement State improvement plans that must include, among other things, processes for developing or adopting State content standards and State student performance standards for "all students" (20 U.S.C. § 5886 (c)). The law explicitly defines "all students" as including students with disabilities (20 U.S.C. § 5802(a)(1)). To ensure that students are attaining the performance standards, Goals 2000 requires that state improvement plans must include a process for developing and implementing nondiscriminatory and reliable state assessments, which are aligned with state content standards, involve multiple measures of student performance and provide for participation of students with diverse learning needs (20 U.S.C. § 5886(c) (1)(B)).

Under Title I, as reauthorized by IASA, a school must provide opportunities for "all" children, including those with disabilities, to meet the state's student performance standards. Yearly assessments must provide for participation of "all" students, with "the reasonable adaptations and accommodations for students with diverse learning needs, necessary to measure the achievement of such students relative to State content standards" (20 U.S.C. § 6311(b)(3)(F)(i), (ii)). Each state plan must demonstrate that state has adopted a set of high quality, yearly student assessments in at least reading and math that will be the primary means of determining yearly performance of school district and school in enabling all children to meet state's performance standards. Such assessments shall "be the same assessments used to measure the performance of all children, if the State measures all children;" provide "coherent information about student attainment of the standards;" and be used so as to be "valid and reliable, and . . . consistent with relevant, nationally recognized professional and technical standards . . . ." (20 U.S.C. § 6311(b)(3)). Finally, state assessments must "provide individual student interpretive and descriptive reports," including scores, or other information on attainment of performance standards, and such results must be disaggregated within each State, local educational agency, and school, including by students with disabilities as compared to nondisabled students (20 U.S.C. § 6311(b)(3)(H), (I)).

- The recent reauthorization of the Individuals with Disabilities Education Act (IDEA) also includes a clear and strong affirmation that state education reform initiatives must fully include students with disabilities (P.L. 105-17). The nature and extent of each student's participation in these initiatives must be determined on an individual basis by the team of educators and parents formulating a student's IEP. The IEP must specify the nature of the student's participation and must state the appropriate modifications/accommodations should be made for the student to participate in state or district-wide assessement programs. (20 U.S.C. 1414(d) (1997), P.L. 105-17 Sec. 101). The recent amendments to the IDEA also clearly articulate each state's responsibility to include students with disabilities in performance goals, in assessments, and in the reporting of test or assessment results with the inclusion of students with disabilities in the reported data (P.L. 105-17, sec. 101).

Prior to the passage of these most recent revisions of the federal laws, while there were few court decisions regarding the applicability of the federal special education laws to standards-based reform, there were determinations that the denial of diplomas to students with disabilities who have been receiving the special education and related services required by IDEA but are unable to pass a state competency test does not constitute a denial of free appropriate education required under the Act so long as students' IEPs were designed to address their participation in the program. Brookhart v. Illinois State Board of Education, 697 F. 2d 179, 183 (7th Cir. 1983). Denial of high school diplomas where students completed IEPs but did not pass state competency test does not violate federal special education statutes, Board of Educ. of Northport-East Northport Union Free Sch. Dist. v. Ambach, 60 N.Y.2d 758, 469 N.Y.S.2d 669, 457 N.E.2d 775 (1983); cert. denied, 465 U.S. 1101 (1984). See also state administrative hearings decisions (Mobile County Bd. of Educ. , 26 IDELR 695 (SEA Ala. 1997).

Professional Standards Concerning Testing Individuals with Disabilities

Careful attention to issues of accommodations in testing individuals with disabilities and reporting their scores is of paramount importance in insuring not only the fairness of the test for these individuals, but also the validity of the inferences made as the result of a test score. Validation of a test requires the collection of sufficient empirical evidence to allow a judgment that the existing evidence supports the intended use of the test. A threshold difficulty that test administrators and validity researchers encounter is verifying the disability of the test-takers themselves. Test administrators must determine whether a particular individual has the claimed disability, what accommodations are required for that disability, and whether those accommodations are appropriate. Additional research challenges arise from the low population size in many groups of test-takers with disabilities due to the existence of too few examinees with each specific disability to conduct separate validity studies. Further, it would be inappropriate to aggregate the performance of several similar disabilities because of variations in severity within a single disability and the occurrence of multiple disabilities in a single person. Finally, reporting scores from accommodated administrations presents a challenge. A score report noting a nonstandard administration gives rise to a likely inference of the existence of a disability and opportunities for unlawful discrimination on the basis of disability may result.

The 1985 version of the Standards for Educational and Psychological Testing (AERA/APA/NCME, 1985) was the first edition to separately address the issues concerning testing individuals with disabilities (or, as they were termed then, "handicaps"). That document states that "reporting scores from nonstandard test administrations without special identification . . . violates professional principles, misleads test users, and perhaps even harms handicapped test takers whose scores do not accurately reflect their abilities." The 1985 Test Standards further require that "[u]nless it has been demonstrated that the psychometric properties of a test . . . are not altered significantly by some modification, the claims made for the test . . . cannot be generalized to the modified version" (APA, 1985).

The current proposed version of the new Joint Committee Standards for Educational and Psychological Testing now under public review (AERA/APA/NCME, 1998), offers some new provisions concerning the testing and assessment of individuals with disabilities. The draft recognizes that there is a far from perfect match between the current technical capabilities of the measurement community and the social and legal policy goals that have been embraced concerning the interests of individuals with disabilities. The chapter on testing individuals with disabilities calls for careful attention to the validity of inferences drawn from tests of individuals, careful utilization of knowledge concerning the impact of disabilities on test performance, and special attention to the development and impact of modifications or accommodations in testing. The chapter also calls for greater emphasis on the collection and analysis of data from modified administrations of tests to study the impact of modification practices, particularly on validity and other technical characteristics of a test. Finally, based upon the presumption that adequate data on comparability of modified and nonmodified test can be more broadly achieved, the chapter creates a presumption that scores from modified administrations of standardized tests should not carry a "flag" or other indicator of a modification in administration. Where score comparability cannot be assured, then the new draft of the Standards calls for a notation of the nature of the modification of administration made rather than a reference to the existence or nature of a test-takers disability.

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A4: Mediation in Education: Annual Update

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Topics:

1. Mediation: Definition and Purposes.
2. Drawbacks of Mediation.
3. Stages of Mediation.
4. Special Education Mediation.
5. Peer Mediation.
6. Mediation: Part of a Dispute Systems Design.
   (a) The Model: A Systems Approach.
   (b) Diagnosis and Implementation.
   (c) Internal Framework.
7. Resources for Practice and Teaching.

1. Mediation: Definition and Purposes.

Mediation is negotiation facilitated by a neutral person. The focus is on having a trained third party help disputants come to their own resolution of a conflict, not on deciding who is "right" or who is the winner or loser. Mediation does not rely on factual presentations, witnesses, or formal rules of evidence. Instead mediators encourage exchanges of information, help parties to understand the others' views and to communicate effectively, stimulate the parties to develop creative solutions, and generate recommended solutions that honor the basic rights of the parties. Mediators have no authority to impose a solution on the parties, and the disputants are free to accept or reject any recommendations from the mediator.

The presence of a mediator changes the dynamic of a negotiation. In education practice, mediation can be useful because it helps clients--parents and school officials--who were previously at an impasse to develop a settlement and avoid litigation. Mediation also can help the parties build a positive continuing relationship, which is necessary for the many years they must interact during the course of a child's educational experience

2. Drawbacks of Mediation.

There are still many questions about mediation in education practice: Do only persons who are motivated to settle engage in mediation? Does the mediator affect the outcome, not just the process? Is there really a saving of time and money if a trained, paid mediator is involved? In addition to these unanswered questions, there is some evidence that unsophisticated parents cannot tell the difference between mediation and litigation, because the mediator is deemed to be an authority figure, thereby creating undue deference to the mediator's recommendations. Another drawback is that parties in school disputes, already emotionally burdened and defensive, may be coaxed into mediation with their positions already fixed, which would undermine the prospects for successful mediation. Finally, like negotiation, if mediation compromises basic rights to education, it violates the intent of the law. In other words, although mediation may result in a settlement, it does not necessarily provide justice.

3. Stages of Mediation.

1) Introduction and explanation of ground rules.

2) Telling the story.

3) Mediator identifies facts and issues.

4) Identifying possible options and solutions.

5) Reaching and recording a settlement.

(Source: Temple Law School LEAP Mediation materials).

4. Special Education Mediation.

In response to landmark lawsuits of the early 1970s, Congress passed the Education for All Handicapped Children Act of 1975. Now known as the Individuals with Disabilities Education Act or "IDEA," (20 U.S.C. Secs. 1400, et seq.) the statute requires states to provide due process hearings to any parent who objects to the educational classification, evaluation, program or placement schools offer to special education students. The 1907 IDEA Amendments require all states to provide a mediation system. Pub. L. 105-17, Section 615(e).

Congress imposed these traditional safeguards in order to secure parental participation in decision-making from which they had been historically excluded. Moreover, Congress opted for adversarial hearings because it believed that they were the best way to afford justice to both school districts and parents. Imposing a legal procedure on the culture of education, however, may not always be the appropriate way to resolve special education conflicts. Special education is enhanced by cooperative relationships between parents and school officials, and the adversarial system tends to undermine cooperation. Peter Kuriloff & Steven S. Goldberg, Is Mediation a Fair Way to Resolve Special Education Disputes?: First Empirical Findings, 2 HARV. NEGOTIATION L.REV. 201 (1997).

5. Peer Mediation.

The American Bar Association Section on Dispute Resolution has developed extensive materials for attorneys who represent school districts or who wish to develop peer mediation programs as a pro bono activity. Their material (JENNIFER DABSON, HOW TO SET UP A PEER MEDIATION PROGRAM) defines peer mediation as follows:

School-based peer mediation (K-12) is a process, which offers students, means of resolving problems without deeming one side the winner and the other side the loser, i.e. it offers a win-win solution.

* It transforms schools climates from places where student conflicts are handled by the traditional means of suspension, detention and expulsion into places where children as young as five years learn how to manage anger constructively.

* It is recognized throughout the nation as a primary means of defusing conflicts in schools. What may be a minor conflict can all too easily escalate into a more serious, and often violent, act.

* Young people who have access to school-based mediation programs and who have been through mediation sessions record great satisfaction with the process: with their dispute resolved, they are in a mind to sit down and learn. Teachers have fewer disputes to resolve and are able to do what they have been trained to do: teach. Students learn valuable life skills that they carry with them through school and into their life beyond school and which help them diffuse conflicts at home and in the community.

6. Mediation: Part of a Dispute Systems Design.

The emerging belief in dispute resolution coincides with current moves toward restructuring and reform, which are based on the same concepts: eliminating traditional hierarchical power through school based management and collaboration of all members of the education community: parents, teachers, students, administrators and concerned citizens.

(a) The Model: A Systems Approach.

A dispute systems design to manage the steady stream of conflicts, which arise, includes the following considerations:

1. Think in terms of "appropriate" dispute resolution. The notion here is that different techniques are best for resolving different disputes. Early negotiation, for example, may be best for resolving most special education disagreements, where the goal of most parents is to be heard and the goal of most school officials is to have a place to learn about parents' needs.

2. The purpose of a model is not to "resolve" conflict, because conflict is at the center of what goes on in schools. it is bound to occur. Consequently, schools need to think in terms of enhancing the capacity of the school district to manage the conflict that is inevitable.

There are two guiding principles of dispute systems design, which may help people develop a foundation for a disputing system and deal with their differences in schools:

(b) Diagnosis and Implementation.

Diagnosis:

1. Define the problem: The actual parties faced with a conflict must be involved in defining the problems their community (classroom, school, district) faces.

2. Determine the scope of the problem: While surface conflicts can be dealt with immediately, the problem must be defined as broadly as possible to reach the most basic level of conflict.

3. Commit to a process controlled by the participants: Those who are affected by the process must commit to implementation, including appropriate follow-up efforts.

4. Link the new process with established decisionmaking bodies: The process needs the support of authorities such as the court and the school board.

5. Represent all major interests. All interests must be represented in the effort for the design to work.

Implementation:

Having determined the type and level of conflict in schools, designers suggest the following internal framework in order to reduce the costs of disputes and to produce more satisfying and long-lasting solutions:

(c) Internal Framework.

1. Provide for early discussion of differences at the building level.

2. Have at the building level several trained negotiators for disputes, so that at least one person will be available who is trusted in times of crisis.

3. Provide for a multi-step process, so that a dispute that is not resolved at the building level can be resolved at the sub-district level (while at the same time keeping it from escalating).

4. Give negotiators authority, so that people will feel that dealing with them is worthwhile.

5. Provide easy access to a neutral intermediary, such as a district-wide ombudsperson, who has the authority to get solutions implemented and skill to encourage continued negotiation about a problem.

6. Teach disputants problem solving skills--how to listen, probe for interests, explore creative options.

7. Create "loop-backs" to negotiation so that people can be moved from a power approach to a negotiation approach (formal cooling-off periods or bringing in a mediator to facilitate negotiations).

8. Start with the least intrusive low-cost procedures such as negotiation before bringing in third parties to mediate, so that those in conflict can retain control of
their dispute and its solution.

(Source: WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, GETTING DISPUTES RESOLVED (1988); John Murray, Designing a Disputing System for Central City and its Schools, 5 NEG.J. 365 (1989)).

7. Resources for Practice and Teaching.

Organizations

American Arbitration Association
140 W. 51st Street
New York, NY 10020-1203
212-484-4000

American Bar Association, Section on Dispute Resolution
1800 M St., NW
Washington, DC 20036
202-331-2258

CPR Institute For Dispute Resolution
366 Madison Avenue
New York, NY 10017
212-949-6490

National Institute for Dispute Resolution (NIDR)/Conflict Resolution Education Network (CREN)

1726 M St., NW

Washington, DC 20036

202-466-4764

Harvard Program on Negotiation

Harvard Law School

Pound Hall

Cambridge, MA 02138

617-495-1684

Society of Professionals in Dispute Resolution (SPIDR)

815 15th St., NW

Washington, DC 10005

202-783-7281

1800 M Street, NW

Washington, DC 20036

202-331-2258

Community Board Program

1540 Market Street

San Francisco, CA 94102

415-552-1250

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FISHER & URY, GETTING TO YES, 2nd ed. (1991).

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SEBENIUS, THE MANAGER AS NEGOTIATOR (1986).

URY, GETTING PAST NO. (1991).

Mediation

BUSH & FOLGER, THE PROMISE OF MEDIATION (1995).

FOLBERG & TAYLOR, MEDIATION (1984).

LOVENHEIM, MEDIATE, DON'T LITIGATE (1989).

ROGERS & MCEWEN, MEDIATION (current w/ pocket parts).

Dispute Systems Design

URY, BRETT & GOLDBERG, GETTING DISPUTES RESOLVED (1988).

Curricula

THE COMMUNITY BOARDS PROGRAM, CONFLICT RESOLUTION: A SECONDARY SCHOOL CURRICULUM.

THE PROGRAM ON NEGOTIATION, HARVARD LAW SCHOOL, CURRICULUM FOR NEGOTIATION AND CONFLICT MANAGEMENT.

Special Education Mediation: A Formula for Success

by

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Abstract

As a result of the reauthorization of IDEA in June of 1997, mediations are now required to be offered as interventions in every state. Missouri, ahead of the regulation, began offering mediations in the fall of 1996. During the past two years, one of the authors has conducted seven mediations between parents of children with disabilities and school districts. Five of these mediations ended with a successful resolution. It is the purpose of this paper to discuss successful mediations and identify common factors.

Special Education Mediation: A Formula for Success

During the past two years, mediation in special education disputes between parents and school districts in Missouri has been used as a strategy to attempt to defuse due process hearings by allowing for less formal discussions for resolution to occur early in the complaint process. Reauthorization of the Individuals with Disabilities Education Act (IDEA) clearly expects every state to offer mediation as an intervention strategy for parents and districts as an attempt to resolve their disagreements related to children with disabilities. It is the purpose of this paper to discuss recent experience with successful special education mediations. The paper will specifically examine several cases with a focus upon common elements which may have contributed to successful resolution.

History

Special education disputes have involved mediation as early as the 1970's (Schrag, 1996a). For example, in 1975, both California and Massachusetts offered this as a new alternative dispute resolution opportunity. It was a voluntary option for parents and educational agencies in regard to special education issues (Symington, 1995). Several other states soon followed the initial model. In fact, thirty-nine states were reported as offering mediation as an option by April of 1994 (Ahearn, 1994). Now, as a result of the reauthorization of IDEA regulations, mediation is required to be offered by school districts to parents of disabled children in every state when due process disputes arise.

The 1997 Reauthorization of IDEA discusses mediation as follows:

1) Parties to disputes involving any matter described in section 615(b)(6) may resolve such disputes through a mediation process which, at a minimum, is available whenever a hearing is requested under section 615(f) or (k).

2) The mediation process -- (a) is voluntary on the part of the parties; (b) is not used to deny or delay a parent's right to a due process hearing under section 615(f), or to deny any other rights afforded under Part B of the Act; and (c) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

3) The State maintains a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

4) The State pays the cost of the mediation process.

5) Each session in the mediation process is scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

6) An agreement reached by the parties to the dispute in the mediation process is set forth in a written mediation agreement.

7) Discussions that occur during the mediation process are confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of such process.

Definition

Mediation, as utilized in special education, is a process in which a mediator serving as a neutral third party assists disputants in reaching a mutually-satisfactory agreement regarding the educational placement, program, identification, evaluation, or other services to be provided for a child with disabilities (Schumack & Stewart, 1995). Mediation is informal, but has structure with a beginning, a middle, and an end. It is a process stressing communication and creative problem-solving (Schrag, 1996b). The mediator does not make decisions for the disputants. Instead, he facilitates a negotiation process between parties who have reached an impasse (Dobbs, Primm & Primm, 1995).

Typical Characteristics of Mediations

Mediation has the following characteristics (Engiles, Quash-Mah, Peter & Todis, 1995; Goldberg, 1989):

- the process is voluntary and the disputants must be willing to negotiate a mutually satisfactory agreement;
- the intent is to allow the disputants to work collaboratively to achieve creative problem-solving;
- the primary parties become empowered by their roles as decision-makers;
- the process has no place for assigning blame or fault; instead, the focus is on reaching agreement;
- both parties are guaranteed confidentiality;
- the mediator's role is to facilitate communication and creative problem-solving by aiding the disputants in defining the problem and working collaboratively in developing a solution, plan of action, or agreement;
- the mediator must be genuinely independent of the disputing parties;
- there must be no formalized procedures in the process;
- there must be a balance of powers between the parties;
- the dispute must be one that is appropriate for mediation;
- the process must be voluntary on the part of both parties;

- the process is geared toward changes occurring in the future.

Conflicts Most Often Leading to Mediation or Due Process

Most conflicts leading to mediation or due process result from discontentment with a child's Individualized Educational Program (IEP) (Singer & Nace, 1985). Additional issues may result from identification, evaluation and placement of a student with a disability (Schrag, 1996b; Fielding, 1990). Such issues may include (Schrag, 1996b): whether a student should be identified as having a disability or the particular disability classification; whether the student is eligible to receive special education and related services; the appropriateness of the programs and services the student is designated to receive; the appropriateness of the designated type and amount of related services (e.g., speech-language therapy, physical therapy, occupational therapy); whether the educational placement designated for the student is in the least restrictive setting.

There are certain cases more appropriate for mediation than others. These are as follows (State of Nevada, 1995): broken lines of communication are the main problem; insufficient information has been provided to one or both parties; noncompliance with statutes, regulation or procedures; there is a dispute between the basic level of trust and good faith between parties; private school placement is not an issue; there is no negative history; or the ability to implement the IEP or the Individualized Family Service Plan (IFSP) by the local district or agency is proven (State of Nevada, 1995).

A 1987 study conducted through the University of Kansas resulted in the following conclusions: The largest single issue that led to conflict between parents and educators was that of placement. Issues involving children with High Incidence disabilities such as Articulation Disorders, Learning Disabilities, Mental Retardation, and Emotional Disturbances led to the largest number of conflicts. Finally, a change in identification, evaluation, education or provision of related services was reported in the majority of cases resulting in conflict (McGinley & Turnbull, 1987).

Factors Leading to Successful Mediations

The success of mediation is dependent on several factors. The skill of the mediator is clearly a major factor in the success or failure of the process (Singer & Nace, 1985). Mediators should be selected with care. They should not have experiences that would result in a conflict of interest. They should be flexible, believe in consensual problem solving, and be available to serve. In addition, it is important they came from a variety of employment and skill backgrounds (Schrag, 1996a). It is important mediators know the facts and issues involved in the dispute; otherwise, parents and school personnel believe there is an obvious lack of interest on the part of the mediator and consider the mediation session an exercise in futility. The mediator should have a basic understanding of the parties' positions on the issues prior to the beginning of the session. He should be prepared to offer several alternatives for resolution. Both parties should be aware of the general agenda and ground rules of the session before it takes place. Therefore, the mediator should request both parties disclose the persons who will be present at the session and to exchange any documents discussed. Finally, both parties should be encouraged by the mediator to regard the mediation session as a sharing of ideas

(Ekstrand, 1983). A climate of openness and commitment to the process must be present. All parties must be willing to listen, to compromise, and to reach a mutual agreement (Schrag, 1996a).

It is important to provide training in mediation for this system to be successful. Not only should mediators receive this training, but school staff who will participate in the mediation session, IEP meetings, placement meetings and due process hearings should also be trained (Ekstrand, 1983). Another significant factor to the success of mediation is that it does not involve simple "yes" or "no" decisions. Instead, in almost all cases an educational plan must be developed. It is also imperative to those who will be involved in the implementation of the plan to be involved in the planning of it (Singer & Nace, 1985).

Another reason mediation is successful is that it is a process that nurtures as opposed to destroying the trust and cooperation needed between people with an interest in the education of children with special needs. The existence of an ongoing relationship between both parties in a dispute contributes to the success of mediation. As a result, amicable settlements are imperative (Singer & Nace, 1985).

Several other factors needed for the success of mediation are as follows (Nouryan & Weisel, 1991; Singer & Nace, 1985): the assistance of well-trained advocates; the consistency with which statutory and regulatory requirements have been enforced by the school personnel; equality of bargaining power between parties; a sense of empowerment; whether the issue is on which can be resolved through mediation; and knowledge of the alternative to settlement - a full blown due process hearing.

Mediations that do not result in written agreements can still be considered successful by measuring the extend they: aid in the development of a respect for the other party's opinions and beliefs; promote a clear understanding of the issues involved in each case; clarify points agreement and disagreement; encourage an atmosphere of rational discussion; and repair relationships for the future (State of Nevada, 1995).

Case Examinations

Five successful mediations were conducted by one of the authors during the past two years. These cases have been documented by the Missouri Department of Elementary and Secondary Education, Division of Special Education.

Case one involved a large rural school district. The district belongs to a special education cooperative of several other school districts, all of which are rural and smaller in size. The parents of a four-year-old child with neurological disabilities filed a complaint requesting a due process hearing. The school district's special education director initiated the mediation, since this was prior to the Reauthorization of IDEA, in an attempt to avoid the due process hearing. According to the director, a series of miscommunications had occurred primarily between the special education cooperative and the parents. It was the director's belief that this dispute could be easily resolved with the facilitation of a mediator.

The mediator contacted the parent by phone, in advance of the mediation session. The mother, whose child was a four-year-old, stated her disappointment that special education services requested some eight months earlier had not been provided to her son.

The mother stated it seemed as if the district and cooperative were deliberately stalling for time. She indicated there was no IEP in place, in spite of a substantial amount of documented diagnostic information. The parent was well-informed regarding special education regulations and requirements and was prepared to go forward with the due process hearing. While expressing anger associated with her perception that the district had failed to serve her child, she remained amenable to trying one final time to work out a solution with the district.

The director of special education confirmed the parent had requested services eight months earlier, and was apologetic that services had yet to be provided. He stated the problem was with the special education cooperative. He said it appeared the special education cooperative simply did not want to serve the child. The director further stated an antagonistic relationship between the district and the cooperative had developed. The director expressed frustration, believing he did not have the formal power or authority to force the cooperative to provide services.

Prior to the mediation, the mediator conducted a lengthy telephone interview with the director. During this conversation, the mediator emphasized the director must secure permission from the superintendent to make decisions necessary to settle this matter in the mediation, even if it meant bypassing the special education cooperative.

The mediation site was held in a neutral setting. The parties had been advised in advance there could be only one spokesperson for each party. Further, it was agreed there could be no attorneys present. Finally, the parties agreed each side could bring a total of three people. The district representation included the director as spokesperson and two people from the special education cooperative. Both parents were in attendance, with the mother serving as the spokesperson.

Initially, the parent provided a non-interrupted statement regarding her view of the issues prompting the due process complaint. The director then reviewed the district's position. He cited difficulties with the special education cooperative in providing services. The director agreed with the parents that there was a substantial record of assessment information which would necessitate the need for services. Apparently, the cooperative had demanded further evaluation before they would consider the development of an IEP.

After approximately two hours of discussion, the group took a brief break to caucus. Upon reconvening, the director stated he was willing to provide district services for the child rather than relying on the cooperative. Services would begin as soon as an IEP could be developed. The parents were quite satisfied with this decision and a written agreement was completed and signed by both parties. The due process complaint was withdrawn and there was no due process hearing.

This case was successfully concluded for several reasons:

1) Both parties had come to the table with a genuine, sincere interest in working out a solution.

2) The mediator spent a substantial amount of time communicating with both parties in advance of the mediation session, which gave him a clear view of the specific issues needing discussion, thus avoiding issues unrelated to this particular due process complaint.

3) The parties were honest and open. Even though the parents exhibited considerable emotion during some phases of the mediation, they stayed the course.

4) The district representative was wisely empowered to make the decisions necessary to conclude the matter.

5) The director was willing to take the initiative to bypass the cooperative and develop in-district services for this child.

The second case occurred in a rural district with approximately 3800 students. Considerable confusion ensued in this case from start to finish, and it was, without question, quite difficult to resolve. The situation involved a high school student who had been subjected to a series of disciplinary actions by the district.

The district was contacted by phone by the mediator to review the situation. During extensive conversation, the director of special services stated this would be a simple matter to resolve in that there were some misunderstandings which could be easily resolved. The director was asked to secure permission from the superintendent to make decisions should the need arise to settle the matter. The director was hesitant to commit willingness to do this, so the superintendent was contacted directly by the mediator. The superintendent readily gave permission for decision-making to the director, and further stated he would be open to telephone contact at any time during the mediation should unforeseen problems arise.

The parent was contacted by phone in advance of the mediation. She stated her anger with the district over past practices involving her son. According to the parent, there had been a long-running feud between district representatives and parents of children with disabilities. When pressed to focus on this particular situation, she said she wanted her son to be allowed to attend the area vocational-technical school. She added her son's rights had been violated by the high school administration in recent disciplinary matters. She said he had received a detention for something he didn't do. With her support, the boy refused to do the detention and was given a three-day in-school suspension. Again with her support, he completed only one of the three days. He was then suspended for three days out of school. When he returned from the out-of-school suspension, he was informed he still needed to complete a detention. He was also told he would not be allowed to make up work missed during any of the disciplinary actions.

The mother then filed a complaint asking for a due process hearing. The mediator informed the mother she should plan a half-day for the mediation. She agreed to a time and place for the meeting and further stated she would be bringing her son to the mediation.

This mediation took place in a motel room on the edge of the community. The director represented the district. The boy was represented by his mother. No other individuals were present. The director brought to the table the entire set of records for the boy. Upon arrival, the parent announced, quite seriously, she only had one hour for the mediation due to other personal situations. This new time restriction placed a strong degree of urgency upon the entire mediation process.

The mother began by stating her position, as follows:

(1) his IEP be amended to assign him to the vocational school,

(2) his school records be expunged of any information regarding the disciplinary actions related to this mediation,

(3) she have the right to see any and all of his records,

(4) he be allowed to make up work missed during the suspensions and receive tutorial services to do so;

(5) and she be notified in advance of any future disciplinary actions regarding her son.

The director retorted with the district's view, during which he managed to so agitate the parent that both were soon engaged in a heated argument requiring mediator intervention to stop. The parent rose to leave the mediation, but the mediator convinced her to stay a little longer. The director indicated he could not make the decisions necessary to fulfill the parent's requests, so the mediator asked him to call the superintendent for authority, which he did during a short break.

The mediation ended, within the prescribed hour limit, with the director agreeing to the parents requests after his conversation with the superintendent. The files were expunged. The IEP would be modified to allow for vocational education. The boy was allowed to make up his work with tutorial services.

This mediation was successful because of a combination of factors:

1) The mediator spent a considerable amount of time communicating with both parties in advance of the mediation session. He was able to have a clear view of the specific issues needing to be discussed.

2) In spite of the unlikely odds, the mediation was completed within the one-hour span set by the parent.

3) The district school superintendent, although not present, was willing to be available by phone in case the director needed to talk to him during the mediation. He instructed the director, mid-mediation when it appeared there was little hope of resolution, to settle the

issues identified by the parent. It was obvious that this case would not have been successful without the timely intervention and support of the superintendent.

4) The issues brought by the parent were settled to her satisfaction.

The third case took place in a large urban district. An upper elementary child had been unilaterally placed by a parent in a private school setting. The parent filed a complaint for a due process hearing to ask the district to reimburse her for tuition to the private school and to provide future services in an alternative placement. The child had not had services in the public school to meet his needs. In fact, the parent had asked for a number of services which had not be provided.

This case was readily resolved during the mediation. The director of special services arrived prepared to take immediate action to serve the child in a manner acceptable to the parent. The director agreed the district had not served the child appropriately. The parent had also come to the table with the hopes of resolving the matter. After a short discussion from both parties, the district agreed to reimburse the parent for the tuition and to work with the parent in finding an appropriate alternative setting for the child.

This mediation was successful because of the following:

1) The mediator again spent a substantial amount of time communicating with both parties in advance of the mediation session. He was able to identify specific issues for discussion.

2) A new special education director came to the table prepared to act to satisfy the parent's concerns. Her view was that the district had failed to properly serve the child.

3) The parent came to the mediation in a spirit of cooperation and willingness to negotiate a resolution.

4) The parent was so pleased with the cooperative and collaborative attitude conveyed by the director that she willingly agreed to settle.

The fourth case took place in a mid-sized suburban school district. The parent of an upper-elementary child with Down Syndrome had filed a due process complaint that the district was not providing appropriate services for her child. The parent had a long history of disputes with the district and it is fair to say that she was openly hostile toward district personnel.

In advance of the mediation, the mediator spent a substantial amount of time on the phone working to identify the issues with the parent. This was the major problem throughout this case. The parent mentioned so many concerns with the district that it was a formidable task to attempt to narrow them and focus on a reasonable number to address. The due process complaint mentioned child abuse as a result of a failure on the part of district personnel to understand the child and her particular disability. The complaint also mentioned numerous violations of the IEP which were related to the primary issue.

In preparatory conversation with the special education coordinator of the district, it was clear there had been a long history of problems between the parent and district personnel. The director mentioned her confusion as to exactly what the issues were. She further stated there had been resolution conferences in which these issues had been seemingly resolved. The director was prepared, however, to come to the mediation and hear the parent out on whatever issues she wished to discuss.

The mediation session lasted some seven hours. Both parents were present, but the mother served as spokesperson. The extreme length of the mediation was due to the fact that the mother presented nearly four hours of information in a non-stop preliminary statement of the issues. The task for the mediator was to find a way to limit the domination of discussion time and to focus on readily identifiable issues.

The district was brief and to the point in it's initial statement. After two lengthy caucus sessions with each party, the issues were clarified and the district offered to compromise. Primarily, the district agreed to enhance it's in-service opportunities for faculty to allow them to acquire a stronger degree of understanding of the disability. The district even offered to allow the parent to serve as a presenter for this in-service. Eventually, the parent agreed to the compromise proposed by the district. She then agreed to withdraw the due process complaint.

This mediation ended successfully because:

1) The mediator effectively worked to focus on a limited number of issues;

2) Caucus sessions were implemented by the mediator to allow for private negotiation with both parties, eventually leading to the successful compromise;

3) The district and the parent were willing to compromise.

The final mediation involved a child with autism receiving services in a rural school district. The parent had filed a due process complaint regarding the implementation of Applied Behavior Analysis (ABA). The parent was attempting to dictate the methodology the district would use to address her child's disability.

Again, the mediator spent a substantial amount of time with both parties on the phone prior to the mediation in an attempt to better understand the issues needing resolution. The parent had some difficulty in focus and was asked to work toward a limited set of issues prior to coming to mediation. The district seemed willing to attend the mediation in a spirit of compromise.

The mediation began with a short statement by the parent which clearly stated her issues. The district responded with a stated unwillingness to agree to the parents request, specifically to invoke ABA. The district's concern seemed to be with the individual who would deliver ABA, rather than with the method. The district proposed an alternative methodology. The parent seemed determined to use ABA and one particular person to deliver the program. After more discussion, the mediator began a series of engaging private sessions with each party in an attempt to work toward compromise. Eventually, both parties compromised. The district agreed to ABA, but with a consultant to be agreed upon by both parties.

This mediation was successful because:

1) The issues were readily identifiable;

2) Both parties were willing to compromise;

3) The use of numerous caucus sessions by the mediator allowed time for both parties to re-frame their positions, look at additional options, and move toward compromise.

4) The skill of the mediator in bringing positive closure to issues of concern to both parties. Both parties left this mediation session feeling as if they had "won."

Conclusion

There is no simple formula for success in special education mediations, as each case is unique in so many ways. However, there are certain constants that seem to be present in the successful mediations considered above. Those constants include:

1) Both parties must be willing to come to the mediation in good faith with a willingness to move from their stated positions toward a compromise solution;

2) The ability of the mediator to identify issues, focus on specific problems, and to work effectively with both parties to reach a mutually acceptable agreement;

3) Substantial preparation in advance of the mediation by the mediator in an effort to identify issues from the perspectives of both parties;

4) Effective use of caucusing to defuse hostility, re-frame issues, and develop alternative solutions toward compromise;

5) School personnel come to the mediation empowered as decision-makers;

6) The issues must be appropriate to allow for mediation.

It is clear mediations in special education disputes can effectively work to resolve conflict and solve problems which would otherwise be addressed in a formal due process hearing. The six factors listed above seem to be consistently present in mediation sessions which conclude with successful resolution. Therefore the authors recommend review of each individual mediation case prior to the session with specific attention to those factors. This formula for success is not so much as a guarantee of success, but more so as a way to provide for a stronger probability of success.

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Trying to Read the Courts on Religion in the Schools: Mapping Our Way into the Millennium

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I. Introduction
  A. This presentation was originally part of a proposal titled "Is the Religious Right Pushing the Pendulum of Education: Are the Old Ways Better?" It has been combined with under the current session. An excerpt from the proposal's abstract follows that shows the subject and scope of the original session.
  B. "Dr. Elizabeth Lugg will discuss the Religious Right's push for home schooling and their success in achieving minimal state regulation in states such as Iowa and Illinois. Dr. R. Andrew Lugg will [discuss] charter schools and whether by supporting these innovative schools the Religious Right is helping to swing the pendulum forward or back." "Dr. Frances Paterson has researched and published in the area of phonics [legislation]. Her presentation will examine how policy makers in states such as Ohio were influenced by the Religious Right in changing their state's reading curriculum."
  C. Although this presentation and those of the original presenters were subsumed under this session which makes reference to case law, this presentation focuses on state bills and statutes. It is a virtual certainty that the courts would uphold these statutes under the rational basis test despite indications that, in at least some instances, there was an element of religious motivation in their introduction and/or enactment.

II. Reading instruction as a religio-political issue
  A. Introduction
    1. State level curricular control
      a. Reflects contemporary trend toward imposing more state-level control
      b. Represents a significant departure from state-level control emanating from state departments of education
    2. The so-called "reading (methodology) wars"
      a. A popular and, more recently, a political issue.
      b. A clash between the heirs of progressive education and individuals and groups who desire to swing the curricular pendulum back to traditional education.
    3. Use of state statutes to require the use of traditional teaching methodology
    4. Why should we care? State bills indicate a willingness to use statutes to impose curricular orthodoxy on local districts, individual schools and classroom teachers.

B. State phonics bills, 1990-1997
  1. Numbers of bills (101 from 1990 through 1997) and enactment (27 from 1990 through 1997).
    a. Methodology/difficulties in identifying
    b. Bills by year

Year	Number of bills	Enacted
1990	1	0
1991	3	0
1992	3	0
1993	4	1
1994	5	0
1995	18	3
1996	34	15
1997	33	8

  2. States with phonics bills (26)
    a. Alabama, Alaska, California, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Mississippi, Missouri, New York , North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Washington, Wisconsin.
    b. From 1990 through 1994, bills had been introduced into eight state legislatures; in 1995, 12; in 1996, 13; in 1997 14.
  3. Provisions (note that bills can and do contain multiple provisions).
    a. Use of phonics as an instructional methodology–50 bills
    b. Inservice or staff development–30 bills
    c. Preservice training or certification
      (1) 26 bills
      (2) An enacted 1996 Ohio bill (S.B. 230) prescribed the required content of required university/college course in highly detailed language.[1]

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[1] The course must include "phonological and morphological underpinnings of English spellings and the history thereof, the nature and role of word recognition in proficient reading; methods and rationale for the instruction of phonemic awareness ['the awareness of sounds that make up spoken words and the ability to use this awareness of sounds in reading'], decoding, spelling, and the application thereof in reading and writing; methods and rationale for the

d. Miscellaneous provisions, e.g. requirements for parental notification (typically that schools must communicate the method of reading instruction and/or test results, testing with some bills requiring retention when students score below a certain level, the use of phonics in adult or bilingual education or both, an "opt-out" provision, authorization and/or funding for demonstration projects, funding to buy materials specifically to support phonics instruction (recently the term decodable text or 95 percent decodable text has begun to appear in the connection with these funding provisions).

e. Punitive provisions

(1) Universities or colleges that failed to offer systematic, intensive phonics courses in their teacher education programs could be stripped of their power to grant teachers' certificates.[2]

(2) Granting parents a statutory right to sue districts that failed to use systematic, intensive phonics.[3]

4. Language (descriptors)

a. Means

(1) Overall– 6.6
(2) 1990 through 1993– 0.89
(3) 1994– 7.6
(4) 1990 through 1994– 2.93
(5) 1995– 6.4
(6) 1996– 6.7
(7) 1997– 8.4

b. Categorizing bills according to language

(1) Mildly detailed (0-2 descriptors), moderately detailed (3-6 descriptors), highly detailed (7 or more descriptors).

(2) From 1990 through 1994, 62.5 percent of all phonics bills employed mildly descriptive language (37.5 percent employed moderately or highly detailed language).

(3) In 1995, these percentage virtually reversed themselves with 66.7 percent of that year's phonics bills employing moderately or highly detailed language employed this degree of language specificity (the percentages for 1996 and 1997 were 82.35 and 63.6 respectively).

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assessment of phonemic awareness, decoding, spelling, and the application thereof in reading and writing; [and] the relation of deficits in phonemic awareness, decoding, spelling, and word recognition to reading disabilities. Ohio Rev. Code Ann. § 3319.24 (Anderson, 1998).

[2] S.B. 2878, 99th Leg., 2d Reg. Sess. (Tenn.), H.B. 2908, 99th Leg., 2d Reg. Sess. (Tenn.).

[3] S.B. 5498, 54th Leg., 1995 Reg. Sess.(Wash.).

5. Enactment
   a. Before 1990, language related to phonics appeared in the statutes of three states: Arizona, New Mexico, and Ohio.
   b. Enactment of phonics bills by year (total 29).

Year	Number of bills enacted	States
1990	0	
1991	0	
1992	1	Louisiana
1993	2	Iowa Mississippi
1994	0	
1995	3	Alabama (1) California (2)
1996	15	California (5) Delaware (1) Idaho (1) North Carolina (1) Ohio (5) Oklahoma (1) Wisconsin (1)
1997	8	California (3) Delaware (1) Idaho (1) Louisiana (2) Ohio (1)

C. Factors influencing prophonics legislation
1. Party affiliation
   a. Bill sponsorship
      (1) Based on 89 bills (excludes bills with multiple sponsors, omnibus bills, and bills where the party affiliation of the sponsor could not be determined).

- (2) 65.2 percent were introduced by Republicans (as of July 1996 48 percent of all state legislators were Republicans).[4]
- (3) Republican sponsorship was 50 percent for bills introduced from 1990 through 1994; 69.9 percent for bills introduced from 1995 through 1997.

b. Party platforms

- (1) Of 36 Republican platforms or resolutions, 6 had planks or provisions related to phonics
- (2) California, Iowa, Kansas, Oklahoma, South Carolina, and Texas.
- (3) Examples
  - (a) "Schools should return to a curriculum that stresses basic skills, such as phonics . . . ."[5]
  - (b) "the primary goal of our public education system should be to teach the basic subjects of reading (emphasizing the intensive systematic phonics method)."[6]

2. Influence of the Christian Right

a. State Republican parties.

- (1) Of the 26 states with phonics bills, the Christian Right is dominant in the state Republican party of 13 states (50%). It is dominant in only 38 percent of all state Republican parties.[7]
- (2) In 21 (80.8 percent) of the 26 states with phonics bills the Christian Right has substantial influence or is dominant in the state Republican parties.
- (3) The Christian Right is dominant in four of the seven states (57%) where the bill language was highly detailed.
- (4) However, the introduction or language of the bills (multiple bills, moderate or highly detailed language or combinations of these categories) is analyzed there is a positive relationship between Christian

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[4] Telephone interview with Brenda Erickson, Research Assistant, Conference of State Legislatures (July 12, 1996).

[5] Kansas State Republican Party, "Kansas Republican Party 1996 Handbook." (Kansas Republican Party, Topeka, Kan., brochure, 1996), p. 62.

[6] Republican State Committee of Oklahoma. "Oklahoma Republican State Convention." (Republican State Committee of Oklahoma, Oklahoma City, Okla., brochure, 1996), p. 16.

[7] A state Republican party is considered to be "substantially dominated" by the Christian Right if the "Christian Right strength in the GOP [is] above 25 percent but less than a majority. The Christian Right is considered to be dominant in a state Republican party if it "constitutes a working majority on major issues." John F. Persinos, *Has the Christian Right Taken Over the Republican Party?* 15 Campaigns and Elections 20, 22 (September 1994).

Right influence in the state's Republican party and its proposed phonics legislation.

3. Challenges to Harcourt's *Impressions* reading series
    a. *Impressions* was the first commercially produced whole language series.
    b. *Impressions* was challenged in 74 school districts in 16 states during the [8] Five of these challenges resulted in litigation. While most of the challenges to the series were based on its content (primarily the presence of stories and/or selections about witches), some parents and community members objected to the series because of its whole language methodology and criticized the absence of explicit phonics instruction.
    c. Of the 16 states that experienced *Impressions* challenges, 12 (75%) had phonics bills.
    d. Local and national Christian Right organizations were active in the opposition to *Impressions* and provided support to the challengers.[9]
    e. It is not unreasonable to suppose that the existence of individuals and groups who had been recently engaged in activism related to *Impressions* challenges broadened their concerns to general prophonics advocacy.

D. Implications
1. Recent decreases in the proportion of challenges brought on religious grounds , especially those involving typical Religious Right issues of concern (excluding those challenges sex education), appear to indicate that activists are changing strategy.[10] New strategies seem to include less attention to challenging curricula, materials, and instructional activities at the district level and more broadly based state level activism designed to influence the methodology of instruction and, perhaps, curricular content as well.
2. The increase in phonics legislation, whether proposed or enacted raises issues related to the wisdom of micro-managing instruction and the use of state statutes to essentially leapfrog the professional judgment of educators. A collateral issue relates to questions of curricular autonomy. We might ask ourselves what message about the professionalism of teachers in the introduction of such legislation.
3. These bills and the on-going debate over reading instruction call upon

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[8] Frances R. A. Paterson, "Legally Related Religious Challenges to Public School Materials, Curricula, and Instructional Activities: The *Impressions* Challenges, 1986-1994" (Ed.D. dissertation, University of Oklahoma, 1997), pp. 256, 367-75. In Paterson's study a challenge was defined as "an act intended to cause the removal or alteration of public school materials, curricula, or instructional activities." Thus, challenges do not include attempts to influence the selection of materials or curricula. *Id.* at 38-39.

[9] *Id.* at 256-263.

[10] *Id.* at 357.

policymakers to consider seriously what it is we want to achieve in terms of literacy. What do we mean by "reading." Oral reading? Silent reading? Decoding? Comprehension? To what extent does emphasis on one aspect of reading instruction affect other reading skills? Do we want students to make high scores on reading tests? Are systematic, intensive phonics programs likely to produce such scores? Do they affect making a smooth and early transition to silent and/or pleasure reading. If there is more support for phonics programs, would other approaches have yielded better results with similar levels of support? Are American children really reading more poorly than they did in the past?

4. Particularly troubling for academics is the Ohio statute prescribing the content of a college or university course. Are we likely to see an increase in such legislation in response to other perceived educational problems?

5. Certainly, religio-political conservatives are opposed to a variety of educational reforms, especially those that might be characterized as nontraditional, e.g. cooperative learning, portfolio assessment, the now defunct outcome based education. It is somewhat difficult to envision a class that uses the highly structured, teacher-centered methodology of systematic, intensive phonics switching to more innovative, progressive and student-centered instruction for other subjects Thus, the kind of instructional techniques required or encouraged by this recent legislation will likely swing the pendulum toward more traditional teacher-centered approaches to instructional methodology in individual classrooms and in American education generally.

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[1] Chicago Manual of Style format. This list does not include documents cited in the body of this paper.

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[3] Additional material can be found via the website for the National Right to Read Foundation at <http://www.jwor.com/nrrf.htm>. Readers interested in Eagle Forum materials related to phonics can access the organization's "First Reader"program at <http://www.firstreader.com/> and can view the reading test at <http://www.firstreader.com/test/test.html>

E-MAIL AND OPEN MEETING LAWS

(Preliminary Findings)

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Over the past year there has been a significant increase in the amount of e-mail traffic among our school board members. I believe this is not an isolated situation but one many superintendents are pondering. Some of the issues, such as equal access and appropriate use, are similar to those we face with student use of this type of technology. Other issues, such as the legal obligation to do the public's business in public, are very complex. As Trotter (1996) noted, a school board president in Colorado was accused of violating the state's open-meeting law by leaving voice-mail messages for other board members. Many of the "sunshine" laws were written before the wide spread use of e-mail and other forms of electronic communication. Superintendents are faced with dealing with questions such as does having a majority of the school board in the same on-line chat room constitute a meeting? How safe is it to discuss negotiation strategies through e-mail messages? What do you do when only six of your seven board members have e-mail access? Is the board member without access at a disadvantage?

To determine the extent of e-mail use among school board members we surveyed 200 superintendents from across the country asking how many of them used e-mail to communicate with their school boards. To date we have received 92 responses. The largest percentage of the superintendents were from rural districts (62%), with student populations of less than 2,500 (54%). A complete summary of survey data is attached.

Of the 92 superintendents, 31 (33%) reported that they used e-mail to communicate with their school boards. Table 1 show how the districts are using e-mail.

Table1.

Notice or scheduling meetings	22
Updates on negotiations	9
Discussion of personnel matters	8
Development of policy	5
Other	24

The "other" tended to fall into two categories, individual questions from board members and general information updates concerning school activities. Two of the districts used e-mail to send out information on emergency situations that may appear in the press (i.e. extensive vandalism or a bus accident). Four of the superintendents reported that the district had provided each of the board members with laptop computers, e-mail software and access to the Internet. Only one of the districts indicated that it also provided technology training for board members. Vail (1996) reported that the Dallas Texas school district had purchased laptops for its members, but found that most board members were reluctant to use the new technology. The Seminole County, Florida school district has also purchased equipment for its board members (Vail, 1996). One of the superintendents, whose board was not currently using e-mail responded that his district was planning to provide computers for the board within the next year. This raises an interesting question posed by a superintendent, "If the district owns the computer, the software and pays for e-mail access who owns the e-mail?" If one follows the standard set in the business world, the school district would clearly own and have the right to read any e-mail sent between and among board members.

While only 31 of 92 responding districts currently use e-mail, 64 of the superintendents reported that at least one of their board members used e-mail. This would seem to indicate that the use of e-mail will expand.

Using e-mail creates a whole set of problems that administrators and boards must resolve. If you send an e-mail message to a member of the Seminole County (FL) school board, you're also sending one to Mike Barry, a reporter for the Orlando Sentinel. "Any e-mail that goes to the board goes to me," Barry says.

In December 1995, at the education reporter's request, the school board arranged to forward all of its e-mail automatically to Barry and to his editor. Far from an invasion of privacy, the arrangement is really openness in government, says Seminole County's board president, Sandy Robinson. Florida's "Sunshine Law" gives the press the right to rifle through school board mail, and the Legislature has explicitly included electronic documents under that law (Trotter, 1996).

Included in the survey was a question which asked "Has your state's open meeting (sunshine) law been revised to deal with the issue of electronic communication?" Approximately 60% of the superintendents stated that their state's sunshine law has not been revised. Another one-third of the superintendents were not aware if their states law had been revised to deal with electronic communication This could indicate many superintendents have not begun to investigate using e-mail with their boards.

We also asked superintendents if they "believe that the use of e-mail or other means of electronic conferencing by a majority of board members violates your state's open meeting law?" The majority (59%) responding to this question indicated that they strongly agreed with this statement (responding with a 4 or 5 on a 5 point scale). Only 21% stated a strong disagreement with the statement (responding with a 1 or 2).

Caplan and Gilvard (1996) point out that a number of states including California, Colorado, Florida, Arizona, Illinois, Massachusetts, New York, Nebraska and Texas clearly include electronic communications under their open meeting laws. They state that the law on this subject is likely to grow quickly in an attempt to keep pace with technology. In the meantime, school boards should continue to limit their electronic communication to non-confidential, informational matters (Caplan and Gilvard, 1996).

When asked if board members used e-mail to discuss board issues with other members, 13% responded yes, 62% no and 25% were not sure. The high percentage of "not sure" would further support the idea that this is an issue many superintendents have not yet addressed. While this may not currently be a high priority issue it could become a problem in the future. Most state's open meeting laws include sections dealing with access to public documents. Superintendents and board members need to be aware that e-mail messages that deal with board business may be subject to public review. Of the 88 superintendents who responded to a question asking if their district had a policy on board use of e-mail or other electronic communications only two responded yes. None of the 32 district currently using e-mail for board communication had such a policy.

All superintendents and board members need to be aware that e-mail is not a secure means of communication. All communications should be sent with the understanding that they may be read by an unintended third party. A school board member in Cornish, New Hampshire found this out the hard way when her e-mail message to a fellow board member concerning candidates for an open board seat wound up on the front page of the local paper.

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e-mail and Open Meeting Laws
Superintendents Survey
Summary of Results as of 8/31/98

DEMOGRAPHIC DATA

1. Location of School District: Rural: 62% Suburban: 30% Urban: 8%

2. Size of School District: 1 -1,000 25% 1,000 - 2,500 29%
2,501- 5,000 20% 5,001 - 10, 000 11%
10,001 - 15,000 8% 15,001+ 8%

QUESTIONS REGARDING BOARD MEMBERS AND SUPERINTENDENT

3. How many members on your school Board? 5.9 members

4. How long have you been superintendent in this school district? 5.7 years

5. Your gender? 19% female 81% male

QUESTIONS ON E-MAIL USE

6. How many members of your board use e-mail? 2.5 number using e-mail

7. Do you communicate with the board members through e-mail? 30 yes 61 no

8. If yes, what is the nature communication? (see table 1 page 10)

	Yes	No
Notice or scheduling meetings	___	___
Updates on negotiations	___	___
Discussion of personnel matters	___	___
Development of policy	___	___

Other (please specify): ____________________________________

9. What do you do if only some of your board members have access to e-mail?

10. Do board members use e-mail to discuss board issues with other board members?

13% yes 62% no 25% not sure

11. Has your state's open meeting (sunshine) law been revised to deal with the issue of electronic communication?

7% yes 59% no 34% not sure

12. I believe that the use of e-mail or other means of electronic conferencing by a majority of board members violates my state's open meeting law?

Strongly Disagree			Strongly Agree	
1	2	3	4	5
		Mean of 3.6		

13. Have there been any challenges to your board's use of e-mail?

1 yes 82 no

14. If yes, what was the substance of the challenge and how was it resolved.

15. Has your board adopted a policy regarding the use of e-mail by board members?

2 yes 88 no

If you have such a policy please send a copy – thank you.

OBSERVATIONS AFTER THREE DECADES OF OPEN MEETINGS

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OBSERVATIONS AFTER THREE DECADES OF OPEN MEETINGS

By
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Open meetings is a somewhat difficult issue to address in a multi-state forum. Generally, open meetings law is a product of statute which will vary from state to state. Also, states may take vastly different routes in interpreting and applying similar statutory language.

The author of this paper first began to work with open meetings issues in 1967 as an aide to the Senate sponsor of the Texas open meetings law. Subsequently, he served as chairman of the attorney general's opinion committee which provided much of the practical interpretation of the act, and as an attorney litigating issues under the act from both sides of the docket. These observations grow out of that experience and suggest ways that one state's response may offer guideposts on good routes to take and on other routes to avoid in developing open meetings jurisprudence.

Methods of Enforcement

Open meetings statutes provide for multiple means of enforcement. These include declaratory relief, injunctive relief, mandamus, civil penalties, criminal penalties, removal from office, and invalidation of actions taken in violation of the statute. Most states provide for a variety of these mechanisms.[1] In the author's experience, injunction, mandamus, and declaratory relief (other than declaratory relief that seeks to invalidate an action) can be effective in establishing legal precedents. Their effect is long-term rather than immediate. These remedies tend to be pursued by the news media, they tend to involve major principles, and their impact is frequently felt more on the general interpretation and understanding of the law rather than on correcting a specific violation. Criminal penalties have some deterrent effect, but are seldom pursued. Where criminal prosecution is undertaken, there is often a history of conflict between the governmental board and the prosecutor. Although the author has no experience with the use of civil penalties as an enforcement mechanism, it would appear that they might be more effective than criminal penalties as they would entail a lesser burden of proof and, as a less draconian measure than a criminal penalty, might be more likely to be pursued.

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[1] In Texas, for example, all are available other than civil penalties.

The most effective formal[2] means of enforcement is invalidation of the governmental body's acts taken in violation of the state's open meetings law. If the state permits private citizens to bring suit to invalidate actions taken in violation of the statute, then there will be a large number of potential plaintiffs who will likely be much more willing to bring a challenge than will a governmental attorney such as the district attorney or the attorney general. The plaintiffs will tend to be highly motivated either because the action being challenged has a serious impact on them--*e.g.*, employment termination--or because the issue involved is one to which they are deeply committed--*e.g.*, policy questions involving matters such as environmental protection, city planning, etc. If the state's statute or court decisions permit award of attorneys fees to successful plaintiffs,[3] there may be an even greater incentive to bring an invalidation suit.

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[2] One of the most effective means of enforcement is extra-legal. When the media publicize violations of the law or suggest that public officials have little devotion to the principles of open government, it frequently works wonders in focusing those officials' attention to the issue.

[3] Attorneys fee award statutes sometimes permit an award to either the defendant or the plaintiff. While there may be tactical reasons for the defendant to pray for an award of attorneys fees from the plaintiff, as a practical matter it may be difficult for a court to award fees or for an elected school board to seek them against a public citizen advocacy group.

Standing

One of the most important issues in determining the practical effect of an open meetings law is the question of who gets to sue. If standing is limited to the attorney general or similar governmental officials,[4] it seems likely that some discretion will be used to be sure that severe remedies, such as invalidating governmental actions, will be sought only in cases that involve the most significant violations. For example, a governmental official who is responsible to the electorate may not be anxious to invalidate an action due to a very technical violation that has no practical effect on the issue of whether the public had the opportunity to be aware of the meeting and to observe the actions of the governmental body. If a case is brought by the news media, the focus presumably will be on deterring future violations of the Act.[5] Where standing is very broad, however, it is likely that other types of suits will be brought. The private citizen is more likely to be interested in reversing a governmental action in order to eliminate an adverse effect on the individual or to achieve a different policy result than the one chosen by the governmental body. Thus, the decision as to who can bring a suit will determine what types of suits will be brought and whether suits to invalidate actions under the open meetings statute will be frequent or rare.

In Texas, an early decision found that a reporter who was excluded from a meeting had no standing to bring a suit alleging a violation of the open meetings act since he did not have an interest in the matter apart from that of the general public.[6] The court employed a traditional standing analysis. The Legislature, apparently concerned that the opinion precluded news media standing, amended the statute while the appeal of the standing decision was pending in the state's supreme court. As introduced, the bill would have given standing to any person by removing any requirement that the plaintiff in an open meetings case be "interested." In legislative committee, however, concerns were raised about broad grants of standing, and the bill was amended simply to ensure that "bona fide members of the news media" had standing. In two other years, bills designed to remove standard standing requirements for the general public in open meetings suits were vetoed by the governor for the stated reason that the governor believed it was bad public policy to expand the number of persons who could seek to invalidate governmental actions. Nevertheless, a Texas appellate court recently dismissed the discussion of legislative history and determined that any person, whether he or she had an interest different than that of the general public or not, could seek to invalidate an action taken in violation of the open meetings act.[7]

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[4] *E.g.*, UTAH CODE ANN., § 52-4-9(1)(1998); KAN. STAT. ANN., § 75-4320(a)(1997). This type of limitation of who can seek to invalidate a governmental action shows up in about half the states. A. T. Schwing, Open Meetings Laws §8.10 at 446 & nn. 9-12 (1994).

[5] *E.g., Cox Enterprises, Inc. v. Board of Trustees of Austin Indep. Sch. Dist.*, 706 S.W.2d 956 (Tex. 1986)(seeking declaratory, injunctive, and mandamus relief aimed at preventing future violations rather than invalidating past actions).

Notice

Virtually all open meetings laws explicitly require that notice be given of meetings and specifically set out the time and manner of notice that is required.[8] While notice issues may appear on their face to be fairly straightforward--*e.g.*, whether the statutory requirements of time and place of posting were met--they have the potential of posing the most dangerous traps for the unwary governmental body. There are many ways to make mistakes in posting notice. Violations of notice requirements are easily proven since the nature of the requirement is that one develop a paper trail that will show if there was compliance or not. Because of the ample opportunities to make mistakes and the ease of proof, notice violations are by far the most common way of challenging open meetings violations in Texas. For example, of thirteen reported appellate cases in Texas in which a governmental action was invalidated for failure to comply with the state's open meetings act, only two involved issues other than failure to post proper notice.[9]

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[6] *City of Abilene v. Shackelford*, 572 S.W.2d 742 (Tex. Civ. App.--Eastland 1978) *rev'd on other grounds*, 585 S.W.2d 665 (Tex. 1979).

[7] *Save Our Springs Alliance, Inc. v. Lowry*, 934 S.W.2d 161 (Tex. App.--Austin 1996, orig. proceeding [leave denied]).

[8] Schwing, § 5.4, at 157 & nn. 5-7. Ms. Schwing suggests that only Alabama and Florida lack specific statutory notice provisions. Alabama law prohibits secret meetings and Florida courts have found that reasonable notice is "'an implicit and inherent requirement of the law'." *Id.*, at 157, nn. 6-7.

Notice requirements, of course, vary from state-to-state with some states merely requiring reasonable notice and others providing very specific mandates as to the content of the notice and the place and time of posting.[10] In the author's experience, the two most common problems involving notice are failure to provide sufficiently detailed notice and the posting of notice in places that may not be accessible to the public. In Texas, notice is generally required to be posted in county courthouses, city halls, or similar public buildings. In one early case, notice, which was required to be posted for three days, was posted in the county courthouse shortly before 5:00 p.m. on Friday afternoon.[11] The courthouse of the small rural county was locked within about an hour of posting. The courthouse was closed all day Saturday and Sunday. It was open on Monday, and the meeting was held as scheduled at 1:00 p.m. Tuesday. Thus, although the statute required three days notice, there were only about a dozen hours during which the public had any opportunity to see the posting. The court concluded that there had been substantial compliance with the statute. The legislature was apparently alarmed by the ruling and responded during the next legislation session by amending the statute to require that the notice be posted at a place "readily accessible to the general public at all times for at least 72 hours before the scheduled time of the meeting . . . ." TEX. GOV'T CODE ANN., § 551.043 (Vernon 1998).

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[9] *See, Lower Colorado River Authority v. City of San Marcos*, 523 S.W.2d 641 (Tex. 1975); *Piazza v. City of Granger*, 909 S.W.2d 529 (Tex. App.--Austin 1995, no writ); *City of Fort Worth v. Groves*, 746 S.W.2d 907 (Tex. App.--Fort Worth 1988, no writ); *Porth v. Morgan*, 622 S.W.2d 470 (Tex. App.--Tyler 1981, writ ref'd n.r.e.); *Mayes v. City of DeLeon*, 922 S.W.2d 200 (Tex. App.--Eastland 1996, writ denied); *Garcia v. City of Kingsville*, 641 S.W.2d 339 (Tex. App.--Corpus Christi 1982, no writ); *City of Bells v. Greater Texoma Util. Auth.*, 744 S.W.2d 636 (Tex. App.--Dallas 1987, no writ); *Port Isabel Indep. Sch. Dist. v. Hinojosa*, 797 S.W.2d 176 (Tex. App.--Corpus Christi 1990, writ denied); *Parr v. State of Texas*, 743 S.W.2d 268 (Tex. App.--San Antonio 1987, writ denied); *Coates v. Windham*, 613 S.W.2d 572 (Tex. Civ. App.--Austin 1981, no writ) (This case is based on the old statute and holds that enforcement provisions of TOMA apply only to failure to give sufficient notice and were ineffective to invalidate action taken in closed meeting where board did not indicate which exemption it was invoking.) Also, it appears that notice was the defect in *Ferris v. Texas Bd. of Chiropractic Examiners*, 808 S.W.2d 514 (Tex. App.--Austin 1991, writ denied), although the court merely notes that the meeting was convened in violation of the Act. The cases that did not turn on notice questions were *Dallas County Flood Control Dist. No. 1 v. Cross*, 815 S.W.2d 271 (Tex. App.--Dallas 1991, writ denied); *Toyah Indep. Sch. Dist. v. Pecos-Barstow Indep. Sch. Dist*, 466 S.W.2d 377 (Tex. Civ. App.--San Antonio 1971, no writ).

[10] *See e.g.*, Schwing, §§5.4-5.32.

The practical problem is that public buildings are frequently locked, which means that there are times when a member of the public will be unable to view a notice posted inside the building. This was addressed by the state supreme court about a decade later when the question arose about a posting in a courthouse that was locked from about 8:30 p.m. until 6:00 a.m. and that was closed on weekends. Even when the courthouse was closed, one could gain access to the notices by going to the sheriff's office which was in the basement and was open 24 hours a day. The court determined that "literal compliance" was required and found that the notice was not readily accessible.[12] In effect, the legislative and judicial response to the legitimate concern about posting notice in places that were locked on the weekends resulted in a very demanding test that can turn on issues such as whether a person can easily gain access to notice at 3:00 a.m.

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[11] *Lipscomb Indep. Sch. Dist. v. County School Trustees*, 498 S.W.2d 364 (Tex. Civ. App.--Amarillo 1973, writ ref'd n.r.e.).

[12] *Smith County v. Thornton*, 726 S.W.2d 2 (Tex. 1986).

Additionally, Texas law requires that notice be given of the subject matter of a proposed meeting. The notice requirement applies to all meetings and to all subjects to be considered in a meeting without regard to whether it is anticipated that the meeting will be open or closed.[13] The specificity of the notice varies with the subject. If the public has a special interest in the matter, greater notice is required. For example, a heading of "personnel" might be sufficient if a school board were discussing routine hiring of teachers or hourly employees such as janitors, cafeteria workers, etc. On the other hand, if the subject is employment of a superintendent, principal, or a football coach,[14] or perhaps discipline or dismissal of a teacher who had gained great notoriety as might occur if there were newspaper articles stating that the individual had been arrested on charges involving child pornography, much more specific notice would be required.[15] This difference in the level of specificity can be a trap for the unwary.

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[13] All meetings in Texas must be open for at least some time since the law requires that a quorum of the board convene in public at a meeting for which notice has been given and that the presiding authority publicly announce the statutory authority permitting the closed session before the board may conduct the executive session. TEX. GOVT CODE ANN., § 551.101 (Vernon 1998). Although the exact procedures seem to vary from state-to-state, most states establish a procedure that ensures some public announcement or vote before a governing body recesses to executive session. Schwing, § 7.6, at 334-38.

[14] In Texas, no one would doubt that most communities have a very high level of interest in who the football coach is. In fact, the level of interest is probably higher than it is in the identity of the superintendent.

[15] *E.g., Cox Enterprises v. Board of Trustees of Austin Indep. Sch. Dist.*, 706 S.W.2d 956 (Tex. 1986).

Practical Implications of Policy Choices

The Texas experience may be a textbook example of how hard facts can make bad law. The legislature and the courts have responded to some egregious fact situations, but those responses, while entirely reasonable in relationship to the situation presented, produce a practical result in combination that is certainly difficult for governmental entities and that may not represent the best public policy.

Early on, the courts in Texas decided that actions taken in violation of the open meeting act were voidable.[16] Subsequently, the legislature amended the act to permit the court to award attorneys fees to successful litigants.[17] The specter of having their actions invalidated became perhaps the most compelling incentive for governmental bodies to be sure that they complied with the act, and thus was the most effective means of enforcement.

The legislative directive that notices of meetings be posted in county courthouses or other public buildings,[18] caused problems when those buildings were closed for the weekend. To remedy this problem, the legislature required that notices be posted in a place readily accessible to the public at all times for at least 72 hours prior to the meeting.[19] When some counties did not get the message and continued to lock the court house, the Texas Supreme Court ruled that literal, rather than substantial, compliance was required.[20] As a result of this change in the standard for measuring compliance, cases were decided on the basis of issues such as: whether a notice was readily accessible when the front door of the courthouse was locked at night and on weekends and entry was through the sheriff's office in the basement;[21] whether a notice was readily accessible when it was posted on a bulletin board located on the ground floor of the courthouse, and night and weekend access to the ground floor was by permission of a security guard who was posted by the ground floor door but who also made "rounds" of the building during which time he had to be summoned by ringing a door bell;[22] and whether a notice was readily accessible when it was posted on a kiosk that was lighted only by street lights and that was located to the side of city hall.[23] In effect, a highly technical standard with no margin for error was created.

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[16] *Toyah Indep. Sch. Dist. v. Pecos-Barstow Indep. Sch. Dist.*, 466 S.W.2d 377 (Tex. Civ. App.--San Antonio 1971, no writ). *Toyah* was the second reported appellate case under the statute and was decided less than four years after the legislation was enacted.

[17] TEX. GOV'T CODE ANN., § 551.142(b) (Vernon 1998).

[18] School districts generally post in the district's administration building.

[19] TEX. GOV'T CODE ANN., § 551.043 (Vernon 1998).

[20] *Smith County v. Thornton*, 726 S.W.2d 2 (Tex. 1986).

When the courts applied standard standing analysis to determine that a reporter was unable to challenge action of a city council in denying him access to a meeting,[24] the legislature was quick to amend the statute to be sure, at the very least, that members of the news media had standing to bring actions.[25] There is an appropriate tendency to construe open government laws expansively in favor of openness, and Texas courts have utilized an expansive view of standing.

When all of these factors--every one of which is presumably a reasonable response to a real problem presented to the court or to the legislature--are combined, the result is that open meetings litigation becomes less about ensuring openness in the decision-making process and more about a means of reversing policy decisions that the plaintiffs disagree with. Thus, for example, when environmental and neighborhood groups disagreed with transportation planning decisions, they filed suit raising numerous challenges under state and federal law. One of those challenges involved the sufficiency of notice under the open meetings act. In that case, the governmental body, a metropolitan planning organization, did not fit precisely within any of the types of governmental bodies defined in the act. Since it was unclear that the entity was even covered by the act,[26] it posted notice at the county court house, at city hall, and at its administrative offices. For important meetings, it also sent notice by mail to a list of about 400 persons and organizations that were interested in its work. Representatives of every plaintiff were on the list. The appellate court, however, determined that it was a special district that extended into multiple counties--a conclusion that had never occurred to the governmental body. As a result it was required to post with the secretary of state. Thus, a very technical issue of where to post--which had no impact on actual notice to the public--became a vehicle by which persons could seek through litigation to obtain policy results that they had not been able to obtain administratively.[27] Since the entity ratified all the challenged actions, no injunctive relief was ever obtained and the decisions of the governmental body were not invalidated. The court, however, awarded the plaintiffs approximately $150,000 in attorneys fees.

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[21] *Id.* (notice was not accessible).

[22] *City of Fort Worth v. Groves,* 746 S.W.2d 907 (Tex. App.--Fort Worth 1988, no writ)(*en banc*)(notice was not accessible).

[23] *City of San Antonio v. Fourth Court of Appeals,* 820 S.W.2d 762 (Tex. 1991)(posting was found to be accessible although three justices dissented, at least one of whom would have held that the notice was not accessible).

[24] *City of Abilene v. Shackelford,* 572 S.W.2d 742 (Tex. Civ. App.--Eastland 1978), *rev'd on other grounds,* 585 S.W.2d 665 (Tex. 1979).

[25] TEX. GOV'T CODE ANN., § 551.142(a) (Vernon 1998).

In a more recent case, a group that disagreed with a school board decision on the location of a new school, filed suit under the open meetings act even before the school board acted. The apparent strategy was to encourage the board to take a different action in order to avoid litigation. When the board acted anyway, the plaintiffs pursued a panoply of open meetings issues, in the apparent hope that one might find favor with the courts. None did.[28] The fact remained, however, that persons dissatisfied with policy decisions had an easy vehicle to attempt to reverse that policy by trying to uncover a technical violation.

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[26] The district court ruled that it was not.

[27] *Austin Transp. Study v. Sierra Club*, 843 S.W.2d 683 (Tex. App.--Austin 1992, writ denied).

To the extent that other states have the opportunity to avoid this particular combination of virtually universal standing, a requirement of literal compliance, and an ability to invalidate policy decisions because of a failure to comply, it may be wise to do so.

Electronic Meetings

An emerging issue in open meetings law is the use of electronic means of conducting meetings. Presumably, this could occur by telephone conference call, by video conference, or by e-mail or computer "chat room."

Although some states have statutes that define "meeting" to require a physical presence,[29] it seems more reasonable and is more often the rule to interpret any collective action as falling under the prohibitions of the statute whether the members of the governmental body are physically present at the same location or participate through some electronic means of communication. Certainly one should not be able to circumvent the provisions of the state's statute merely because a meeting was by telephone or computer e-mail rather than in person.

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[28] *Save Our Springs Alliance, Inc. v. Austin Indep. Sch. Dist.*, 973 S.W.2d 378 (Tex. App.--Austin, 1998, no pet.).

[29] A survey of the 50 states' open meetings laws lists Massachusetts, Minnesota, New York, and Virginia in this category. Schwing, § 6.38, at 277 n.17.

The issue becomes more difficult when the question moves beyond which electronic meeting activities are prohibited to which are authorized. While it may make sense to say that a closed discussion by telephone violates the statute, it may be reasonable to permit open meetings at which one or more members participates through speaker phone or some similar means. A majority of states permit telephonic meetings in some circumstances, either by statutory authorization or by judicial interpretation.[30] In Texas, for example, the Attorney General determined that the statute did not permit meetings to be held by telephone conference call even when they were arranged so that members of the public could listen.[31] The Legislature then amended the act to permit such meetings in limited circumstances. First, conference call meetings were permitted for specific agencies that took the initiative to have a narrow amendment enacted specifically for those agencies. Subsequently, the statute was amended to apply to all agencies, but only in those cases in which there was an emergency and it was difficult or impossible to get a quorum at a single location. Of course, in all cases the meeting had to be audible to the public.[32] Thus, while telephone meetings were permitted, the circumstances were severely limited to situations in which there was an emergency and there was no other good way to take action.

Anyone who has observed a telephone meeting and had difficulty identifying speakers from their voice over the speaker phone can testify that a telephone conference call meeting does not provide the same view into the deliberative process as actually seeing the board members in person. A video-conference removes many of the problems inherent in telephone conference call meetings since the observer can both see and hear the participants.[33] The equipment is not now as universally available and as inexpensive as telephone conference call equipment, so the issue has probably not come up as much. If telephone conference call meetings are permitted, however, there seems to be little reason not to permit video-conference meetings. Further, there is little reason to restrict video-conferences as severely as telephone conferences. For example, in Texas, telephone meetings can generally be held only in cases of emergencies where a quorum cannot otherwise be obtained. No such restriction exists for video-conferences. Video-conferences must, however, provide opportunities for the public to observe at each site at which participants are present.[34] If the transmission is lost at any site or if the quality of the transmission falls below a pre-established level, the meeting must recess or adjourn until every site has access to the full meeting.[35] As a practical matter, it seems unlikely that video-conferencing will become very common in the school board context, where board members typically reside in a small geographic area, at least until the technology is much more common.

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[30] Schwing, § 6.44 at 281-86.

[31] OP. TEX. ATT'Y GEN. No. JM-584 (1986).

[32] TEX. GOV'T CODE ANN. § 551.125(b) (Vernon 1998).

Although, it seems unlikely at present to be accepted as a means of conducting a governmental meeting where elected or appointed representatives formally conduct public business, there is a way to use e-mail and discussion group software to create electronic forums or town meetings on the internet. Because access to the internet is not universal, it is not likely that it will be an exclusive way of participating in discussions. It is certainly possible, however, to post a topic and solicit comments and discussion from the public. This sort of device has been used by the Nuclear Regulatory Commission in its rulemaking function. It divided the discussion into three stages. First, there were five days to identify major issues. Second, twelve days were devoted to soliciting and receiving suggestions on how to address the issues that had been identified. Finally, there were nine days during which the participants could analyze the alternatives and provide final comments.[36] This provides excellent opportunities for public participation, but it is unlikely to substitute for being able to see and hear the governmental decisionmaker. Thus, its role may be in the public participation model and not as a substitute means of conducting an open meeting at which public issues are finally decided.

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[33] Of course, video access to a meeting does not provide the same experience as in-person observation. Anyone who watches C-SPAN and sees members of Congress delivering impassioned speeches seeking to persuade their colleagues knows that the effect is different if the camera is focused tightly on the speaker than it is if it uses a very wide angle and shows that the speaker is arguing to an empty chamber.

[34] TEX. GOV'T CODE ANN. § 551.126 (Vernon 1998).

[35] OP. TEX. ATT'Y GEN. No. DM-480 (1998)

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[36] S. M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information through the Internet*, 50 ADMIN. L. REV. 277, 320-24 (1998).

THE LAW GOVERNING SEXUAL HARASSMENT

Nelda Cambron-McCabe, Martha McCarthy, Julie Underwood, and
L. Dean Webb

TOPICS

I. Sexual Harassment in Employment

- Opposite sex and same-sex harassment
- Evolution of standards under Title VII of the Civil Rights Act of 1964
- Equal Employment Opportunity Commission guidelines

II. Employee-to-Student Harassment

- School district liability under Title IX of the Education Amendments of 1972
- Liability under 42 USC § 1983 for constitutional violations
- Office for Civil Rights guidelines
- State remedies

III. Student-to-Student Harassment

- School district liability under Title IX of the Education Amendments of 1972
- Liability under 42 USC § 1983 for constitutional violations
- Office for Civil Rights guidelines
- State remedies

IV. Policy Implications

- Tension between federal judicial rulings and federal administrative agency guidelines
- Position statements of professional associations
- Suggested school district policies and procedures
- Educational programs and other preventive measures

Selected Cases

Sexual Harassment in Employment

Burlington Industries v. Ellerth, 118 S. Ct. 2257 (1998). Plaintiff quit her job as a salesperson after repeated offensive remarks and gestures by a supervisor. Specifically, she alleged that he threatened to deny her tangible job benefits for refusal of his advances. The Supreme Court held that under Title VII of the Civil Rights Act of 1964 an employee who refuses unwelcome and threatening sexual advances of a supervisor, but suffers no adverse, tangible job consequences, may recover damages against an employer without showing the employer is at fault for the supervisor's conduct. The employer, however, may raise an affirmative defense to liability or damages. That is, employers can protect themselves by adopting policies and procedures to prevent harassment, by correcting harassing behavior, and by showing that the employee failed to take advantage of corrective or preventive opportunities provided by the employer.

Farragher v. City of Boca Raton, 118 S. Ct. 2275 (1998). Plaintiff, a lifeguard for the city, alleged that her supervisors had created a sexually hostile environment by repeatedly subjecting her and other female lifeguards to "uninvited and offensive touching," by making lewd remarks, and by speaking of women in offensive terms. The Court held, as in Burlington, that an employer is subject to vicarious liability for a hostile environment created by a supervisor with immediate (or higher) authority over an employee. When an employee suffers no tangible adverse job consequences, however, an employer may raise an affirmative defense to liability or damages.

Harris v. Forklift Systems, 510 U.S. 17 (1993). In this case, the Supreme Court addressed whether a plaintiff needs to prove psychological injury, particularly in the absence of tangible job losses. The Court held that Title VII is violated if the environment would reasonable be perceived as hostile and abusive and that psychological injury need not be shown. The Court suggested the following criteria in assessing whether an environment is in fact hostile: the frequency and severity of the discriminatory conduct; whether the behavior is physically threatening or humiliating, or merely an offensive utterance; and whether the conduct unreasonable interferes with an employee's work performance.

Meritor Savings Bank. V. Vinson, 477 U.S. 57 (1986). The Supreme Court recognized for the first time that a Title VII violation can be predicated on harassment that creates a hostile or offensive working environment in addition to harassment that involves conditioning employment benefits on sexual favors (quid pro quo). The Court rejected the employer's claim that the prohibition of sex discrimination was intended to prevent only tangible losses of an economic character rather than injury from psychological aspects of the work place. Further, the Court held that the employer may not use as a defense the fact that the individual for a period of time voluntarily engaged in sex-related conduct. The crucial consideration is whether the alleged sexual advances were "unwelcome;"

however, the Court ruled that the victim's conduct could be relevant in making this determination.

Oncale v. Sundowner Offshore Services, 118 S. Ct. 998 (1998). The Supreme Court ruled that same sex sexual harassment is actionable under Title VII. In this case, a male who was employed as a roustabout on an eight-man platform crew alleged that he was forcibly subjected to humiliating sex-related actions by several of his male co-workers in the presence of the crew and that a male co-worker physically assaulted him in a sexual manner and threatened to rape him. After his supervisors' failure to take any action, he quit the job based on his belief that he would have been raped. The Court emphasized that plaintiffs (male or female) "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimination . . . because of . . . sex.'"

Employee-to-Student Harassment

Gebser v. Lago Vista Independent School District, 118 S. Ct. 1989 (1998). The Supreme Court found no direct evidence that any school employees were aware of a teacher's sexual relationship with a student until a police officer caught the teacher and student engaged in sexual activity. The Court held that a school district official with authority to institute corrective measures must have actual notice of, and be deliberately indifferent to, the harassment to abridge Title IX of the Education Amendments of 1972 (prohibiting gender discrimination in educational institutions receiving federal funds). Distinguishing Title IX from Title VII of the Civil Rights Act of 1964 (barring employment discrimination), the Court rejected use of the Title VII negligence standard in Title IX cases. The Court also rejected the argument that the teacher's use of his position of authority to seduce the student made the school district vicariously liable. The Court reasoned that since the private right of action is implied (rather than explicit) in Title IX, Congress did not intend for a recipient of federal aid to be subjected to unlimited damages if unaware of the discrimination in its programs.

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992). A female student alleged that a high school teacher/coach initiated sexual conversations, inappropriately touched her, and subsequently had coercive intercourse with her on school grounds. She contended that school authorities were aware of the harassing behavior but took no action, which entitled her to damages under Title IX. The Supreme Court held that Congress did not intend to restrict the remedies available to individuals for Title IX violations, and thus students can seek monetary damages for intentional gender discrimination in the form of sexual harassment by school employees.

Rosa H. v. San Elizario Independent School District, 106 F.3d 648 (5th Cir. 1997). A female high school student had a sustained sexual relationship with the school's karate instructor, and because of the relationship she allegedly became suicidal and was hospitalized. While the instructor was found guilty of abuse, the court did not find the school district in violation of Title IX. The court held that a supervisor must have actual knowledge of the substantial risk that abuse will occur and the authority to stop the harassment and fail to do so to abridge Title IX. Recognizing that intentional discrimination on the part of the district is required, the court noted that deliberate indifference to harassment constitutes an intentional wrong rather than mere neglect.

Becerra v. Asher, 105 F.3d 1042 (5th Cir. 1997), cert. denied, 118 S. Ct. 82 (1997). A teacher sexually abused a child several months after the child withdrew from the teacher's school, and the abuse occurred in the victim's home. The appeals court found no violation of the student's constitutional right to bodily integrity on the part of the school district or its administrators because the teacher who sexually abused the child did not act under the color of state law. Thus, the court rejected the claim for damages under 42 U.S.C. § 1983 for the alleged constitutional violation.

Smith v. Metropolitan School District of Perry Township, 128 F.3d 1014 (7th Cir. 1997), cert. denied, 118 S. Ct. 2367 (1998). A seventeen-year-old student's sexual relationship with a teacher was concealed until the student graduated from high school, at which time the student brought suit for damages against the school district and school authorities. The appeals court ruled that school authorities with the power to take action must have actual knowledge of a sexual relationship between a teacher and student and fail to take appropriate steps for the school district and its administrators to abridge Title IX or constitutional rights. Rejecting the use of negligence or pure agency standards, the court held that Title IX has no language indicating that discriminatory conduct of employees should be imputed to the educational programs or activities.

Floyd v. Waiters, 133 F.3d 786 (11th Cir. 1998). Students, who allegedly were sexually harassed by a school district security guard, brought suit for intentional discrimination against the school district. The appeals court held that the school district was not liable under Title IX, absent evidence that either the superintendent or school board members knew of the misconduct and failed to act. Furthermore, the court rejected liability for constitutional violations under 42 U.S.C. § 1983, finding no custom or practice of constitutional violations or failure on the part of the school district to train or supervise its employees.

Mary M. v. North Lawrence Community School Corporation, 131 F.3d 1220 (7th Cir. 1997), cert. denied, 118 S. Ct. 2369 (1998). A middle school student claimed that the school principal had sufficient knowledge of her sexual relationship with an adult cafeteria worker to establish liability under Title IX. Despite finding a Title IX violation on the part of the school district, the lower court did not award the student any compensatory or punitive damages. Remanding the case for a new trial, the appeals court held that sexual advances by an adult employee toward a thirteen-year-old student can never be considered welcomed, so the district court judge's instructions to consider "welcomeness" misled the jury. The court declared that since children under sixteen cannot consent to sexual intercourse for criminal purposes in most states, they similarly cannot consent in civil actions.

Doe v. Claiborne County, 103 F.3d 495 (6th Cir. 1996). A student allegedly was harassed, abused, and ultimately statutorily raped by a teacher/coach, who eventually pled guilty to one count of statutory rape. The student sued the school district for damages under 42 U.S.C. § 1983 for alleged violations of her constitutional right to bodily integrity. The court held that the school board must have notice of a pattern of persistent abuse by an employee and give tacit approval of the unconstitutional conduct or exhibit deliberate indifference to the conduct to establish the necessary causal link between the official policy of inaction and the constitutional violation. No liability was assessed against the school district in this case because no evidence of wrongdoing on the part of the school board was established.

Doe v. Taylor Independent School District, 15 F.3d 443 (5th Cir. 1994), cert. denied, 513 U.S. 815 (1994). A teacher sexually abused a child, and the court found that the principal had not acted to stop the harassment even though he had ample notice of the school employee's inappropriate behavior. The court recognized that defendant school officials can be liable under 42 U.S.C. § 1983 if they learned of a pattern of inappropriate sexual behavior by an employee toward a student and demonstrated deliberate indifference and such failure abridged the student's constitutional right to bodily security.

Stoneking v. Bradford Area School District, 882 F.2d 720 (3d Cir. 1989), cert. denied, 493 U.S. 1044 (1990). A student claimed that the school principal had knowledge of a band director's history of sexual misconduct and took no action, resulting in her subsequent assault by the director. The court held that students have a clearly established constitutional right to be free from sexual abuse by school personnel, and a school district may violate this right by maintaining a policy, practice, or custom reflecting deliberate indifference to this right. Such a finding could subject the district to liability for a constitutional violation under 42 U.S.C. § 1983.

Student-to-Student Harassment

Bosley v. Kearney R-1 School District, 140 F.3d 776 (8th Cir. 1998). A female third grade student alleged that school officials failed to protect her from harassment by fellow male students who inappropriately touched her, made inappropriate comments, and drew pictures of naked girls in her presence. Assuming for the purposes of this case that Title IX prohibits student-on-student harassment, the court held that evidence did not support the student's claims. School officials had immediately disciplined students in each instance.

Doe v. University of Illinois, 138 F.3d 653 (7th Cir. 1998). A female high school student was the victim of continuous verbal and physical sexual harassment by a group of high school males over an eighteen-month period. The Seventh Circuit Court of Appeals held that "a Title IX fund recipient may be held liable for its failure to take prompt, appropriate action in response to student -on-student sexual harassment that takes place while the students are involved in school activities or otherwise under the supervision of school employees, provided the recipient's responsible officials actually knew that the harassment was taking place" (138 F.3d at 661). This ruling does not hold a school district liable for harassing students' actions but rather for a district's failure to take action when it has knowledge of sexual harassment.

Brzonkala v. Virginia Polytechnic Institute, 132 F.3d 949 (4th Cir. 1997). A college student successfully alleged that violent gang rape by two student athletes was plainly sufficient to state a claim for hostile environment sexual harassment under Title IX. The university's imposition of virtually no penalty for an admitted rape after a hearing that was procedurally biased against the female student established a basis for alleging institutional liability.

Davis v. Monroe County Board of Education, 120 F.3d 1390 (11th Cir. 1997). A fifth-grade female student suffered harassment over a six-month period by a male student, which culminated in the student pleading guilty of sexual battery in a state court. The Eleventh Circuit Court of Appeals ruled that Title IX, enacted under Congress's spending power which requires explicit notice of liability, did not provide notice to districts that they could be held liable for failure to prevent non-employees from sexually harassing a student. The court declined to apply Title VII principles imposing liability for failure to remedy a sexually hostile environment.

Oona, R.-S. v. McCaffrey, 122 F.3d 1207 (9th Cir. 1997). The Ninth Circuit Appellate Court denied immunity under 42 U.S.C. § 1983 to school officials who did not respond to a sixth-grade female student's complaints of sexual harassment by boys in her class and a student teacher. The court did not address steps school officials must take to prevent harassment by fellow students but stated that a duty exists to take reasonable steps.

Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996). The appellate court ruled that a peer harassment suit involving sexual orientation and gender under the Equal Protection Clause was viable. A homosexual student suffered verbal and physical abuse for years by his peers with school administrators allegedly responding with deliberate indifference. Evidence also showed that school officials did not follow their regular investigatory procedures used in pursuing female students' harassment complaints.

Rowinsky v. Bryan Independent School District, 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996). Appellate court held that Title IX liability exists only for the acts of federal grant recipients; no liability exists for the conduct of third parties. For liability to exist, a student plaintiff must show that school officials treated sexual harassment claims of female students differently than sexual harassment claims of male students.

Nicole M. v. Martinez Unified School District, 964 F. Supp. 1369 (N.D. Cal. 1997). Court denied a motion to dismiss both a Title IX suit against the school district and a 42 U.S.C. § 1983 suit against the principal. The principal had responded to harassment claims by a female student but the plaintiff argued that the corrective measures were inadequate.

Bruneau v. South Kortright Central School, 935 F. Supp. 162 (N.D.N.Y. 1996). Student asserted that male classmates sexually harassed her and that the school district had not taken measures to prevent the harassment. The court ruled that a school district must have actual notice of abuse for liability to be imposed.

Doe v. Petaluma City School District, 949 F. Supp. 1415 (N.D. Cal. 1996) (Petaluma III). On a motion to reconsider a 1993 peer sexual harassment suit in light of developing case law, the federal district court held that the Title VII hostile environment standard should be applied in Title IX cases. To prevail the plaintiff must prove that she was subjected to unwelcome harassment based on gender, that it was so severe or pervasive as to create a hostile educational environment, and that the school officials knew or should have know of the harassment and failed to take prompt and appropriate action.

Wright v. Mason City Community School District, 940 F. Supp. 1412 (N.D. Iowa 1996). Recognizing that Title IX encompasses a claim for peer-to-peer sexual harassment, the court held that an educational institution must know of the harassment and *intentionally* fail to take remedial actions because of the plaintiff's sex. A high school student, who had been raped by her ex-boyfriend and subsequently pressed charges, experienced widespread harassment primarily by female peers. Evidence showed no intentional discrimination; school officials took numerous actions to reprimand and discipline student perpetrators.

Seamons v. Snow, 864 F. Supp. 1111 (D. Utah 1994). In this case, a male student claimed sexual harassment under Title IX. His teammates taped him to a towel rack as was leaving the shower and brought in a girl he had taken to the prom a few weeks earlier. After the student reported the incident, he was dismissed from the football team and suffered extensive harassment from his classmates. The court held that the harassment suffered by the student was not based on gender and thereby did not violate Title IX.

Student Suicide and Educator Duty: A Law and Policy Survey

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Introduction

Now pending before the Circuit Court of the Fourteenth Judicial Circuit, Henry County, Illinois is the wrongful death lawsuit of Mr.James Melvin in behalf of his deceased daughter, Erin Lyn, against the Galva Community Unit School District #224 and Mr. Steve Johnson, the Galva High School principal.(1) The facts alleged in the cause of action reflect those of a growing number of events in small and large schools througout the nation.

According Mr. Melvin's complaint, on October 28,1996 Mr. Johnson, while acting in his capacity as principal, acquired actual knowledge that Erin Lyn was threatening suicide. More specifically, Principal Johnson came into possession of a note written by Erin Lyn in which she stated her intent to commit sucide.(2) Johnson responded by writing a note to Counselor Larry Varner, who was away from the building at a meeting, directing him to see Erin first thing the next morning. He did not call Erin into his office. He did not try to contact Erin's parents or anyone else at the time. The next morning Mr. Johnson learned from the school social worker that thirteen year old Erin Lyn had hanged herself in the closet of her bedroom at her home.(3)

Overview of the Student Suicide Phenomenon

CDC Statistics

According to the 1998 Centers for Disease Control and Prevention's Youth Risk Behavior Survey, suicide is the fourth leading cause of death among people ages 5 to 24. Accounting for approximately 12% of all deaths among the identified group.

In its most recent report the CDC presented the results of the latest survey of 10904 high school students in grades 9 -12. The results showed that approximately 24% (2617) of the respondents had thought seriously about suicide. That females (30%) were significantly more likely than males (18%) to contemplate ending their own lives. That 18% ((1963) had made a definite plan. That during the 12 months prior to the survey 9% (981) had attempted to kill themselves. And that 3% (327) had perpetrated attempts which caused injury,poisoning, or overdose serious enough to require medical attention.

Illinois Survey

During the summer of 1998 the Illinois Principals Association (IPA) and the Illinois Institute for Rural Affairs (IIRA) at Western Illinois University jointly sponsored a survey of public school principals in an effort to gather base line data regardng the incidence of suicidal behavior among Illinois public school students along with information concerning various legal and policy implications.(4) Preliminary results of responses from the 1847 IPA members who were sent surveys show that,while not high, the number of student suicides in Illinois is significant. A total of 261 responses had been received at the time of this writing. Of those 196 (82.7%) of the valid responses reported no suicides in their districts in the last five years. However, 22 (9.3%) reported a single suicide. While another 13 (5.5%) reported 2 self caused deaths. Four responses (1.7%) cited 3-4 student suicides and 2 (.8%) of the reporters stated that their districts had experienced 5 or more deaths of students during the reporting period.

The suicide attempt numbers are less definitive. Valid responses showed that 102 (46%) respondents identified no attempts within the last five years. Another 48 (21.6%) experienced 3-4 incidents. While a surprising 6 (2.7%) respondents reported more than 20 attempts in the five years preceding the survey.

The survey also inquired about methods of dealing with student suicidal behavior and any legal ramifications from such situations. Respondents were asked if any lawsuits had been filed against their districts as a result of such conduct. Preliminary reports show 4 (2%) cases filed. Of those 2 had been resolved in favor of the district. The remaining 2 were pending. Although likely, it is unknown if one of the pending causes of action is Melvin v. Galva CUSD #224 .

Case Law History and Analysis

Case Law History

Bogust v. Iverson 10 Wis 2d 129,102 NW 2d 228 (1960)
A seminal case involved the suicide of a college student six weeks after her counselor terminated sessions despite knowledge of continuing emotional problems. Additionally, the counselor failed to refer the student for psychiatric evaluation or notify the student's parents. In affirming the trial court's grant of summary judgement for defendant, the Wisconsin Supreme Court declared unreasonable a standard which would require a teacher or other person without training or expertise to recognize in a student a condition which involves a medical diagnosis. In addition, short of a custodial relationship or taking charge of a helpless person, one who gratuitously renders services to another is not liable if the person is not left in a worse position. Finally, the court found that a suicide constitutes an intervening force which breaks the theoretical causal chain from the defendant's act to the death.

Shaner v. Greece Central School District #1 51 AD 2d 662,378 NYS 2d 185(NY App 1976)
The sister of a high school student who shot himself while sitting in the vice principal's office sued for her own mental and emotional distress plus medical expenses incurred by her mother in treating plaintiff. The wrongful death action alleged that the school district "permitted" plaintiff's brother to kill himself by leaving him in the principal's office an hour after learning he was in possession of a loaded hand gun. The New York Supreme Court Appellate Division affirmed the granting of defendant's motion to dismiss saying that there was no cause action for unintended harm sustained by one solely as a result of injuries inflicted directly upon another. Regardless of the relationship to the injured party or whether the one was an eyewitness to the incident which caused the harm.

Kelson v. City of Springfield 767 F 2d 651 (9th Cir 1985)

Fourteen year old confronted a teacher with a handgun and demanded that the teacher place coins from his a desk drawer on top of the desk. The teacher complied and then convinced the boy to accompany him to an empty room to speak to the vice principal. While there the boy kept the gun in his trouser waistband and showed the vice principal a suicide note. Meanwhile office staff called local police. The vice principal convinced the boy to accompany him to his office. While on the way

they were confronted by a police officer who told the boy that he "was in trouble with the law." Minutes later the boy was allowed to go to the bathroom where he shot himself to death. The parents sued the district, the city and various individuals under 42 USC 1983 claiming violations of their right to the care,custody,companionship and society of their son as guaranteed by the 9th,1st and 14th Amendments. In reversing the district court's dismissal of the suit, the Ninth Circuit recognized an "undeniable" liberty interest in the care, custody and companionship of children. And that the constitutional tort remedy was available if the parents were able to show that the violation of the right occurred without due process as a result of some law,regulation, policy or official practice.

Eisel v. Board of Education of Montgomery County 324 Md 376, 597 A 2d 447(1991)

A thirteen year old girl became involved with satanism and developed an obsession with self-destruction. During the week prior to her death in a murder-suicide pact with another teenager, the girl told several friends that she was planning to kill herself. They, in turn, reported this information to the school counselor. He called the student to his office and confronted her with the report. She denied the statements and any suicidal intentions. The counselor did not notify the girl's parents.The state of Maryland had promulgated a Youth Suicide Prevention statute with accompanying Youth Suicide Prevention Program regulations. The Montgomery County Board of Education had, in turn, passed a "suicide prevention" policy. In reversing summary judgement for defendants the Maryland Supreme Court quoted Prosser and Keeton on *Law of Torts* saying: "Changing social conditions lead constantly to the recognition of new duties." Consequently, the growth of the social problem of adolescent suicide makes reasonable the imposition of a duty upon counselors to take steps to prevent suicide when they have actual notice of a suicidal intent. The legal basis for the new duty grows from a combination of *in loco parentis* and the therapeutic nature of the student-counselor interaction to form a special relationship. Moreover, issues of confidentiality do not prevail in balancing the wrong to be prevented. The Bogust precedent was factually distinquished. The former involving no prior notice of the counselee' suicidal intentions.

Hoeffner v. The Citadel et al 429 SE 2d 190 (SC 1993)

A college sophomore told a staff physician that he was contemplating suicide. The doctor referred the student to a school counselor and continued his treatment. The student hanged himself in his dorm room. In the ensuing trial of the wrongful death suit brought by the parents the court instructed the jury that a person who commits suicide assumes the risk of death when he acts. Reversing the jury verdict for defendants the South Carolina Supreme Court reminded the litigants that the defense of assumption of risk applies where the plaintiff assumes a risk of harm arising from the negligent or reckless actions of the defendant rather than plaintiff's own act. The court went on to declare that,if a duty to prevent suicide exists in such circumstances, the act of suicide resulting from the breach of the duty cannot establish a defense to liability for the breach.

Nalepa v. Plymouth-Canton Community School District ; Encyclopedia Britannica et al 207 Mich App 580, 525 NW 2d 897 (Mich App 1994)

Plaintiff's decedent was a second grade student. He and his classmates were shown a movie called *Nobody's Useless* produced and distributed by defendant Encyclopedia Britannica. The film dealt with the struggles of a handicapped boy to deal with his disability. In the film the boy twice attempts suicide,once by hanging, before being taught by an older boy how to deal with the handicap. The next night the young student was found by his parents hanging from the safety rail of his bunk bed. The parents sued,among others; the school district, the superintendent, the principal , the boy's teacher , the school counselor and Encyclopedia Britannica Educational Corporation. The trial court, ruling on various pretrial motions by both parties, found that the school officials were not absolutely immune. In addition, the court declared that the corporate defendants had no duty to the plaintiffs and that the teachers were not liable for educational malpractice.Affirming in part and reversing in part, the Michigan Court of Appeals interpreted the state immunity law to provide absolute immunity to elected officials and the highest appointive executive officials in a school district. Moreover, in producing and distributing the film, the corporate defendants were not potentially liable per the doctrine of "assumed duty." Citing the *Restatement of Torts* , section 324A, the court agreed that in some circumstances when an actor undertakes to render services to a person it may assume a duty to third parties for failure to exercise reasonable care in performing the service. However, the rule is inapplicable where benefit is conferred through actions which are pursued for defendant's own purposes. Finally, the law of Michigan does not recognize the theory of educational malpractice.

Wyke v. Polk County School District 898 Fed Supp 852 (MD Fla 1995)

Thirteen year old committed suicide at his residence. He had made two attempts at school in the days just prior to his death. The first attempt occurred in the restroom when the boy was discovered by another student trying to hang himself with his football jersey. The friend told his own mother who called the Dean of Students.(The mother testified that she did not know the Wyke boy's mother well enough to contact her directly.) The Dean said that "he would take care of it." Whereupon he called the boy into his office, talked to him, read him some Bible verses and sent him on his way. The Dean did not report any of these events to anyone because he believed it was "too much red tape " and he believed he had the situation "under control". The boy's second attempt followed the meeting with the Dean, also in the restroom. A custodian reported having a conversation with a boy she could not positively identify in the cafeteria.She said they were talking about the boy's problems with his grandmother. He went to the bathroom and was gone longer than normal. When he emerged he said to the custodian that had he stayed any longer he would have killed himself. She went in and found a coat hanger and a cord hanging from the ceiling. The custodian reported the events to the Vice -Principal who,allegedly, asked her if she could not find something else to do. Mother brought a federal action pursuant to 42 USC 1983 alleging violation of the fundamental liberty interest in care, companionship,custody and society of her son as protected by the 1st and 14th Amendments. Additionally, she claimed that the school district's failure to train its staff in suicide prevention amounted to deliberate indifference to the duty to protect. Finally, plaintiff attached a pendent state claim for wrongful death. The District court dismissed the federal claim. A jury found for the plaintiff in the wrongful death action. Both parties appealed.Citing , *inter alia, Deshaney v. Winnebago County Dep't. Of Social Services* 489 US 189 and *Vernonia School District v. Acton* 515 US 646(Compulsory attendance laws alone are not a "restraint of personal liberty" sufficient to give rise to an affirmative duty to protection.), the 11th Circuit refused to impose a federal constitutional duty to protect students upon public school officials. However, the court did rule that Florida law does impose a duty to supervise students placed in their care. Moreover,the duty is operational(ministerial) rather than discretionary. Thus school personnel must exercise the degree of care that a person of ordinary prudence charged with such a duty would exercise in the circumstances. A breach of this duty to supervise will expose the school to liability for foreseeable injuries caused by the failure to use ordinary care. Thus, when a student attempts suicide at school and the school knows of the attempt, the school can be found negligent for failing to notify the child's parents. Additionally, the Florida School Health Services Act mandates school based health services to be "carried out to

appraise, protect, and promote the health of students." In so doing the act requires a "health services plan" which, at a minimum, provides for meeting emergency health needs and "consulting with students' parents/guardians regarding the need for health attention. Accompanying regulations declared: "(I)n the event that an accident or serious illness occurs during the school day. The school is obligated to immediately notify the parents or responsible person designated by the parents." Thus, there is an affirmative duty imposed by state law for notice to the parents when a child is in such an acute emotional state that he is, not just talking about suicide, but attempting it.

Fowler v. Szostek 905 SW 2d 336 (Tex App 1995)

School officials investigating a report of drug dealing on campus interviewed two boys who said they bought marijuana from plaintiff's decedent. The boys gave signed statements and confessed to their parents. The parents and their daughter were summoned to school and interviewed. The girl denied involvement. At the conclusion of the interview school officials informed the girl and her parents that they had decided to suspend her from school pending expulsion. Mother took her daughter home and left her while mother ran an errand. During mother's absence the girl's step father came home early from work and talked to her. Again she denied any involvement in the alleged drug dealing. He left to return to work. The student shot herself and died later at the hospital. At the foot of her bed a note was found saying: "I lied, I love you." A wrongful death suit alleging "negligent discipline" followed. Defendants moved for summary judgement pursuant to the Texas immunity statute. The trial court denied the motions. An interlocutory appeal was taken. The Texas Court of Appeals reversed the trial court finding that no reasonable trier of fact would find that "negligent discipline" had occurred.The Texas Education Code provides that no professional employee of a school district is personally liable for any act done within the scope of his/her duties and which involve the exercise of discretion except in the case of use of excessive force in discipline or negligence resulting in bodily injury to students. This "negligent discipline" exception to the grant of immunity was limited by the court to circumstances where there is actual force used upon a student or where some action by the student as a result of discipline causes injury; eg, running laps. Here the injury occurred long after the student had been removed from school custody and control. In such circumstances the Texas Code provides that it is the duty of the parent /guardian to provide adequate supervision. Finally, the actions of school officials were discretionary by nature and also protected by general notions of common law immunity.

Killen v. Independent School District #706 et al 547 NW 2d 113 (Minn App 1996)

A ninth grade student expressed suicidal ideations to her counselor in September. He reported the conversation to the her parents and recommended professional analysis. The student was diagnosed with clinical depression. The therapist reported that progress was being made but the girl was not out of danger of suicide. This information was not shared with the school. In December the student wrote an essay in English class about a girl who shoots herself in the chest. Her teacher talked to the student and reported to the counselor.This incident was not reported to the parents, however. In January another school counselor received a call from another student who reported that she had received a letter from the student saying that she intended to get a gun from her basement and kill herself. This was reported to the first counselor who contacted the student. She said that she only thought about suicide when she was fighting with her parents and that she was not thinking about it now. The counselor did not report either the letter or the conversation to the parents. The two days following her latest counseling session the student stayed home from school with parental permission. On the second day she killed herself with a gun she got from the basement. Her parents brought a wrongful death action alleging that the district and counselor had been negligent in failing to adopt a suicide prevention program and failing to notify parents regarding the events immediately preceding the girl's death. Defendants successfully moved for dismissal at the trial court level citing immunity for discretionary actions.
The Minnesota Court of Appeals affirmed finding that there was no legal mandate for a suicide prevention program and that the actions of the counselor were within his professional discretion. A dissent was filed expressing the belief that the actions of the counselor were operational(ministerial) in nature.Discretionary immunity involves the exercise of judgement between policy choices. In this instance there were no policy choices to be made. Citing *Eisel v. Board of Education,* supra, the dissenting justice opined that the counselor possessed training and experience in such matters. Additionally, he had actual notice of the student's ideations. Thus,

at a minimum, the educator had a legal duty to notify parents .

Brooks v. Logan (Brooks I) 903 P 2d 73 (Idaho 1995)

As an assignment in English class high school students were required to keep a daily journal. The assignment was to go on for several months. The teacher originally told students that she would be reviewing the journals for content. However, Jeffery Brooks complained that he could not fully express himself if he knew that the teacher would be reading his entries. The teacher then agreed to check only for dates and length. The student committed suicide at his home during the pendency

of the assignment. Afterward the teacher read the deceased student's journals and found allusions to death and depression. She turned the journal over to the school counselor. Who,in turn, turned it over to the parents. The boy's parents contacted the teacher who, according to the plaintiffs, said that she had "reread" the journals and decided to give them to the counselor. Parents sued the district and teacher for negligence in not adopting a suicide prevention program and the teacher for negligence in not notifying them of the suicidal ideations in their son's journal. The trial court granted summary judgement in favor of defendants finding no duty to warn and discretionary immunity for not adopting a suicide prevention policy.The Idaho Supreme Court affirmed the finding of discretionary immunity in the district's lack of a suicide prevention policy. It also affirmed the finding that neither the teacher nor the district were liable under the "assumed duty" theory. The court explained that the theory requires a showing that the defendant volunteered to assist someone in need then failed to do so as promised. Here the teacher's propensity to help troubled students is not enough. However, the court read the state compulsory attendance law mandate "to protect the morals and health of the pupils" to create an affirmative duty to act to prevent foreseeable harm to students. Thus it remanded the case to determine if the teacher had been negligent in not notifying parents.

Brooks v. Logan (Brooks II) 944 P 2d 709 (Idaho 1997)

Following a second grant of summary judgement for defendants a second appeal was taken. The Idaho Supreme Court adopted the *Bogust v. Iverson* , and *Eisel v. Board of Montgomery County,* supra , precedents saying that a teacher is under no duty to look for potential suicides or to take action to prevent such conduct. The statutory obligation imposed in *Brooks I* runs to those with training and actual knowledge of the suicidal intentions of a particular student. The statutory duty created in the state's compulsory attendance statute is a general mandate of adequate supervision.

Brown v. Board of Education of the City of Milford 42 Conn App 824, 681 A 2d 96 (Conn App 1996)

Police received a telephone call saying that someone at plaintiff's decedent's address was in danger of committing suicide. Upon arrival they found the student alone. They questioned him, did a cursory search for weapons and left the boy with instructions to have his parents call the station. Approximately an hour after they left the boy shot himself. Father sued the board and the police. AT the ensuing trial the court instructed the jury on intervening cause and the jury found for defendants.The appellate court declared that proximate cause is a jury question. Therefore, if the

jury has determined that there is sufficient evidence to establish that the failure of the police to protect decedent from any peril which allegedly was created by the board and educators the doctrine of intervening cause may relieve the school defendants from liability.

Grant v. Board of Trustees of Valley View School District 221 Ill Dec 902, 676 NE 2d 705 (Ill App 1997)

Senior in high school told friends that he was going to kill himself and wrote suicide notes.The friends reported to the counselor who questioned the boy and called his mother.The counselor told mother to take the boy to the hospital for drug overdose treatment. He did not mention the suicide threat. On the way to the hospital with mother the boy jumped out of the car. Later he jumped off a highway overpass and killed himself. Mother filed a three count complaint against the school and counselor. Count I alleged violation of a duty flowing from a special relationship. Count II alleged a breach of an ordinary negligence standard for failure to develop a suicide prevention program as provided for in the Illinois School Code. Count III alleged wilful and wanton negligence for failing to take proper precautions to prevent the suicide when defendants had actual knowledge of student's intent. Trial court granted defendant's motion to dismiss based on statutory immunity. The Illinois Appellate Court found that the "special relationship" exception to the grant of statutory immunity for public employees and entities involves a variety of factors. The pertinent one in this case being the requirement that the injury occur while plaintiff is under the direct and immediate control of employees or agents of the governmental body. Such was not the case here. As to the Illinois School Code provision empowering boards to promulgate in service training for staff and mandating a topic on suicide intervention, the court found no legal mandate. It also looked to another provision of the Illinois immunity statute which absolves public officials for failing to adopt policy or not adopting adequate policy. As to any duty flowing to the counselor , the Illinois Local Governmental and Governmental Employees Tort Immunity Act specifically immunizes public agents and entities for failure to diagnose physical or mental conditions or for misdiagnosing such afflictions unless there is evidence of wilful and wanton conduct. In addition, the panel interpreted the *in loco parentis* status of Illinois educators as providing an additional layer of common law protection. Nevertheless, the justices explained that wilful and wanton conduct occurs when an actor has actual or constructive knowledge of circumstances which pose a high probability of serious physical harm to another and acts with conscious disregard thereof. Thus, though the evidence was insufficient in the present matter, a case could arise where a counselor fails to take any action upon learning of a student's intentions that wilful and wanton conduct has occurred.In dissent, one justice wrote that failure of a counselor to notify parents of a student's suicidal ideations after obtaining actual knowledge of impending danger does,indeed, constitute wilful and wanton disregard for the student's life and health.

Scott v. Montgomery County Board of Education (Unpublished Decision) 120 F 3d 262 (4th Cir (Md) 1997)

Junior high student with behavioral problems was evaluated for special education identification after refusing to do his school work and getting into fights. The boy was given a Serious Emotional Disorder (SED) label. During a followup meeting with parents the student threatened to run out in front of an eighteen wheeler. During the same meeting the school psychologist recommended medical and psychiatric evaluation. Through a series of placements and evaluations the problems continued culminating with the student being suspended after threatening his math teacher with physical harm and shoving her. The boy was picked up from school by his noncustodial father and dropped at mother's residence. Mother came home from work for lunch, spoke to the boy and went back. She returned at 5:00 PM and spent the evening. Mother fell asleep and awakened to find the boy hanging. A suicide note was found. Mother filed a multi-count federal action per 42 USC 1983 including allegations of 5th & 14th Amendment violations, violations of rights guaranteed by Section 504 of the 1973 Rehabilitation Act, an IDEA violation,

and a pendent state wrongful death cause of action. Expert evidence in behalf of plaintiff consisted of depositions from two clinical psychologists opining that school personnel failed to adequately diagnose a serious psychiatric disorder and that the undiagnosed problem "materially contributed to the cause of the suicide." The trial court granted defendants' summary judgement motion.
Held: Expert evidence is not sufficient for a jury to reasonably find the school people liable. Factors beyond the control of the educators, including a family history of suicide attempts and serious emotional/psychological problems, may well have may been the proximate cause of the death.

Case Law Analysis

From the line of cases just discussed several patterns of authority emerge. As would be expected, early attempts to hold school districts and individual educators liable in tort for the suicide deaths of students was met with great skepticism by judicial tribunals. The *Bogust* court set the standard with its rejection of a general duty to notify parents and special relationship theories. It also put an exclamation point on its decision with the declaration that the act of killing oneself serves to supervene any causal chain which may have begun with an act of a defendant. The *Shaner*

decision reinforced *Bogust* with its rejection of third party responsibility and duty to protect.

The first inroad for plaintiffs came with the constitutional tort analysis in *Kelson*. There the 9th Circuit applied the liberty interest in the maintenance of parental care, custody, companionship, and society. However, proving that a particular child's suicide resulted from, or grossly negligent lack of, an official policy, regulation or practice is quite another thing. The *Eisel* case provided a second major breech in the *Bogust* bulwark. The Maryland Supreme Court had little trouble interpreting a statutorily mandated Youth Suicide Prevention School Program so as to impose a duty upon school counselors to take reasonable steps to prevent student suicide when they have actual notice of such intent. In addition, the court ,citing *Prosser and Keeton on the Law of Torts* , did a bit of social engineering with its declaration that the growth of the social problem of adolescent suicide makes reasonable the imposition of such a duty in these circumstances. Apparently in that vein the Maryland high court reached farther than it may have had to with its additional holding that the common law doctrine of *in loco parentis* and the general therapeutic nature of the job of the counselor combine to form a "special relationship" carrying a duty to protect suicidal students. However, to date, there appears to be no move by other tribunals to adopt this line of thought. In fact the weight of authority is clearly counter. Other courts, ie the Idaho Supreme Court in *Brooks I and II*, and the Illinois Appellate Court in *Grant*, have refused to recognize the general special relationship theory. Moreover, the Illinois appellate panel saw the *in loco parentis* doctrine not as a sword for plaintiffs but as an additional shield of common law immunity for school defendants.

Make no mistake, school districts and staff are far from vulnerable. Statutory immunity regularly protects educators and educational policy makers from liability. In addition, there has been no hesitation to find immunity in the common law exception for discretionary action in cases which involve allegations of failure to promulgate suicide prevention programs, see *Killen*, *Brooks I* and *Grant*. Other theories which have not been particularly successful involve "assumed duty"; see *Nalepa,* and *Brooks I*, educational malpractice; see *Nalepa,* and a general duty to protect flowing from a custodial relationship caused by compulsory attendance laws; see *Wyke*, *Brooks I and II.* Obviously, when there is a statutory or administrative mandate educators will be charged with knowledge of the law and held responsible. Finally, there is a clear trend in favor of holding counselors and other trained personnel to a duty of parental notice where they have actual knowledge of suicidal ideations on the part of a particular student; see *Eisel, Wyke, Brooks I and II*, dissent in *Killen* and *Grant.*

Policy Considerations

Illinois Survey

Respondents were asked what method(s),if any, had their districts established for dealing with student suicide? Of the valid preliminary replies approximately 47% reported either past practice or an informal policy. While 34% reported that a formal policy operated in their district. Finally, just under 19% of the respondents said that there was no policy or established practice where they worked. A similar question regarding attempted suicide was asked. Interestingly, the preliminary numbers were substantially dissimilar. To this inquiry approximately 63% said that their district operated pursuant to past practice or an informal policy. A formal policy directed 25% of the respondent districts. While 13% had no policy or established practice. Given the state of the legal authority, how, if at all, should school districts respond to the growing phenomenon of student suicide?

The first thing is for all administrators and counseling personnel to know the law in their particular state which deals with student health and abide by that law strictly. Some states such as Maryland with its Youth Suicide Prevention program and Florida's School Health Services Act provide comprehensive, and mandatory, programs for students and school personnel. Educators who remain ignorant or consciously disregard these kinds of mandates do grave disservice to their students and districts. Secondly, administrators and counseling personnel must be aware of the limits placed upon protecting student confidences. Staff persons should be aware of state confidentiality statutes as well as professional codes of ethics in the area. For example, the Illinois Mental Health and Developmental Disabilities Confidentiality Act provides in part:

> "Records and communications may be disclosed ...when,and to the extent, a therapist, in his or her sole discretion,determines that disclosure is necessary to...protect the recipient...against a clear, imminent risk of serious physical or mental injury ...or death being inflicted... by the recipient on himself ..."(5)

The act goes on to provide immunity from civil, criminal or other liability to any person who participates in good faith in making a report pursuant to the section.(6)

Beyond being knowledgeable of state statutory and regulatory mandates, the simplest and most effective policy guidance a school district can promulgate is a mandate of full communication with

parents/guardians whenever a student gives reasonable evidence of having suicidal ideations. The policy should mandate timely direct contact from counselor/social worker/psychologist to the parents. In the case of a student making such expressions to a teacher or other staff member,the policy should require an immediate report to counseling/psychological personnel with accompanying notice to building level administration. All reports should be documented contemporaneously by the reporter with pertinent details including the date,time and persons notified.

Some commentators advocate district level suicide prevention policies and programs involving the total school staff.(7) Given the state of the law today caution is advised as in this case less may be better. Such programs usually involve training faculty and staff to recognize signs of depression and other indicators of suicide danger. Along with reporting lines that go through building administration. As seen in *Killen, Brooks* , and *Grant* , courts have been reluctant to impose a general duty to protect students upon the general school staff and have readily immunized educational policy makers when they exercised their discretion against such initiatives. The danger in comprehensive suicide prevention programs,other than those mandated by statute, lies in administration. Unless regularly monitored,updated and efficiently executed such policies can easily become legal traps for the district and its staff. No court or legislature has declared that schools are insurers of student safety and security. Quite the contrary, the standard imposed is to proceed reasonably and professionally given the totality of the circumstances. The ultimate responsibility for the welfare of children still lies with parents and guardians. The courts continue to recognize that fact where there is no clear legal mandate otherwise. But as stated above, a clear trend in judicial analysis in student suicide cases is to hold trained personnel to a duty of notice to those who are ultimately responsible. It is a duty which can be easily fulfilled and has the greatest potential for advancing the best interests of the troubled child

Conclusion

In the aftermath of the tragic suicide of thirteen year old Erin Lyn Melvin, Galva High School Principal Steve Johnson was forced to sit before the girl's stricken parents and testify that, given what he thought he knew about their daughter, "... there was just no reason to think that this was a serious note."(8) As of this writing the school district has tried unsuccessfully to assert the Illinois Local Governmental and Governmental Employees Tort Immunity Act as a basis for a motion to dismiss the case. The Illinois Appellate Court has declared in its *Grant* decision that school personnel should take every suicide threat seriously and take every precaution to protect the child. Moreover, if there is sufficient evidence to prove that the threat was consciously disregarded, there can be a finding of liability, despite statutory immunity .(9) The law case grinds on . As does the grief. For want of a telephone call.

Endnotes

1. Melvin v. Galva Community Unit School District#224, Illinois Circuit Court, 14th Judicial Circuit, Henry County, Illinois, Case #97- L 29 .
2. Deposition of Steve Johnson, page 21.
3. Complaint,page 2; Johnson Deposition,page 23.
4. The writer wishes to gratefully acknowledge Dr. David Turner,Executive Director , Illinois Principals Association; Dr. Norm Walzer,Director, and Ms. Lori Sutton of the Illinois Institute for Rural Affairs and Ms. Suzan Nash, Executive Director, Western Illinois Regional Council/Community Action Council for their assistance in the planning and execution of the survey.
5. 740 Illinois Complied Statutes (ILCS) 110/11.
6. Ibid
7. Doris Rhea, *The Need for a School Suicide Prevention Policy,* NASSP Bulletin, April, 1995, 1-9.
8. Deposition of Steve Johnson, page 22.
9. *Grant v. Board of Trustees of Valley View School District* 221 Ill Dec 902, 676 NE 2d 705, 709 (Ill App 1997).

OBLIGATION OF SCHOOL COUNSELORS TO WARN OF POSSIBLE SUICIDE

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Introduction

Tragically, suicide has become a leading cause of death among young people.[1] The relationship between school counselors and students may allow the student to signal their intentions to the counselor. Questions then arise as to the counselor's legal obligations. The counselor must also be concerned about his/her ethical obligations and the effect of action or inaction upon state licensing or professional certification.

This paper reviews the ethical guidelines of professional associations and reported court decisions which discuss the legal liability of educators who have knowledge of a student's suicidal tendencies. A short answer to the question posed is that school personnel are normally obligated to advise parents immediately.[2] Courts have been very slow to impose liability upon counselors, especially in a private clinical setting of church. School counselors are in a somewhat unique situation because students are in school "custody" and educators have important obligations to parents, a factor not necessarily present in other settings. Understanding the rationale of the ethical guidelines and cases will hopefully help clarify the obligations of school counselors.

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[1] Suicide is the fifth leading cause of death among 5-14 year olds and the third leading cause among 14-24 year olds. *Statistical Rolodex*, Centers for Disease Control (updated 5/28/98).

[2] A decision making model for counselors who are perplexed by this dilemma is published by ACA. See: *A Practitioner's Guide to Ethical Decision Making*, Holly Forester-Miller & Thomas Davis, American Counseling Association (1996).

Applicable Ethical Guidelines

It is important to understand the difference between privilege and confidentiality. Testimonial privilege concerns the ability of the court to order disclosure of the communication in legal proceedings. The law has recognized certain specific privileges in an effort to balance potentially competing interests: an interest in the full disclosure of the facts in court and an interest in encouraging certain relationships which allow clients/patients to speak candidly with professionals. Historically, testimonial privilege has been reserved for physicians, attorneys and the clergy. In each case, the privilege has been thought important to protect and promote the confidential relationship. Obviously an attorney cannot fully protect a client's interest unless the client feels free to disclose all information without fear of reprisal. Likewise, a physician cannot hope to reach a proper diagnosis unless the patient fully and candidly disclose symptoms. There is no uniform national protection afforded the communication to counselors. That is undoubtedly one of the reasons why the ethical standards of American School Counselor Association require that counselors advise students, early in the relationship, of the degree of confidentiality which the student may reasonably anticipate.

Confidentiality is the general ethical obligation of professionals to maintain the confidence and the secrets revealed to them by their clients. In many professions, codes of ethical standards expressly require that client communication be held confidential. Unlike the privilege, ethical standards require the professional to protect the information from disclosure in any context, not just in court or governmental proceedings. Confidentiality described in professional ethical standards is not necessarily enforced or protected by the law. Adherence to published standards may be a condition of certification by a state Board of Education or licensing by a state licensing board. Thus, whatever the direct legal impact, licensed counselors may be bound by standards promulgated by their professional association and violation may impact membership in that association or, if a condition of employment, the contract itself.

The ethical code of the American School Counselor Association specifically says that when the client's condition indicates that there is a clear and imminent danger to the client or others, a counselor must take reasonable action to inform responsible authorities. The ASCA emphasizes the confidentiality of communication with students, but treats as an "exception" information received from students which "presents clear and imminent danger to the client or others."[3]

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[3] ASCA - *Ethical Standards for School Counselors*, p.2 "Confidentiality" @ Section 6 (Revised 6/23/98).

These ethical guidelines are important for two reasons: (1) the individual's job description or contract may include a requirement of full compliance with these guidelines and the breach of that obligation may breach the contractual relationship and may affect the individual's certification or licensing. It is extremely important for the individual counselor to understand what professional and ethical requirements are attached to the job; (2) professional standards of conduct also bear upon legal liability, particularly liability predicated upon a theory of negligence.[4] Negligence emphasizes an applicable standard of care to and accepted guidelines of professional associations be admissible in court as evidence of reasonably expected conduct in particular circumstances.

Section 1983 Liability

A provision of federal law creates civil liability for violation of an individual's constitutional rights.[5] However, courts have been very reluctant to apply this law to cases involving student suicide. The law is aimed at policies of school districts which reflect "deliberate indifference" to the constitutional rights of students.

An illustrative case comes from the state of Florida.[6] The mother of a junior high school student who committed suicide at home sued the school district for failure to train employees in suicide prevention. The trial court dismissed the action brought under Section 1983 but did not submit to the jury the claim of negligence. The jury apportioned part of the fault to the district, at a cost to the district of $165,000.

The thirteen year old boy(Shawn) first tried to hang himself in the boys' locker room but was discovered by another student, who reported the incident to his mother. She called the school and talked to the Dean of students, who said that he would "take care of it." The Dean called Shawn into his office and read to him from the Bible. The Dean thought that he had the situation under control. Experts testified to the need for training in suicide prevention to ensure that the staff would understand the seriousness of suicide ideation.

The court was concerned whether the district had any potential liability under Section 1983 to protect Shawn from private violence, but concluded that the parents' claim was not "so insubstantial" as to deprive the court of jurisdiction. The holding seemed to turn upon the Dean's comment that he "would take care of it", which may have left the student "more vulnerable."

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[4] *Tarnsoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976).

[5] 42 U.S.C. S. 1983.

[6] *Wyke v. Polk County School Board*, 129 F. 3d 560 (1997).

The court held that the mother failed to demonstrate any Section 1983 claim for failure to train in suicide prevention, holding that "failure to train" is not a "policy" for purposes of Section 1983. The courts specifically rejected the argument of Shawn's mother that because he was a minor child in the custody of the school under compulsory attendance laws, the district had a constitutional duty to protect him from hanging himself.

Section 1983 is an important area of potential liability because the relationship between parent and child receives constitutional protection from government interference. In 1982, "Brian" brandished a .38 caliber revolver at school while displaying a suicide note.[7] Shortly after being confronted by a police officer who told him he "was in trouble with the law," Brian shot himself in the restroom. The parents sued under Section 1983, claiming violation of fundamental parental rights.

The court emphasized that parents have a constitutional "liberty" interest in the maintenance of the relationship with their child and it may not be interrupted without due process. However, the court emphasized that Section 1983 is violated only by the execution or implementation of official governmental policy. The only potential "policy" cited by the Kelsons was a failing to train school personnel in suicide prevention, which is not a "policy" for these purposes.

Potential Section 1983 liability might apply if the suicide followed a pattern of sexual abuse by school personnel. Cases have held that students have a constitutional right to bodily integrity protected by the due process clause of the fourteenth amendment. Sexual abuse by a school employee violates that right and school officials can be liable for supervisory failure which manifesst deliberate indifference to the constitutional rights of the child.[8]

Negligence

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[7] *Kelson v. City of Springfield,* 767 F.2d 651 (9th Cir. 1985).

[8] *Stoneking . Bradford Area School District,* 882 F.2d 720 (3rd Cir. 1989); *Doe v. Taylor Independent School District,* 15 F.3d 443 (5th Cir. 1994).

Recovery in tort (negligence) requires a showing that the district owed the student a duty of care and that breach of that duty caused the damage. In order to construct at "duty," courts often require that the damage be reasonably foreseeable and that a close connection be shown between the breach of that duty and the suicide. All of those elements are difficult to prove.

The conceptual problems in bringing a claim for suicide based upon negligence arose in a 1960 decision of the Wisconsin Supreme Court.[9]

Jeannie Bogust was a student at Stout State College where the defendant, Ralfe Iverson, was employed as a full-time director of student personnel services and professor of education. He was in charge of the counseling and testing center and administered aptitude and personality tests to the student. He was well aware of her emotional disturbances, social conflicts and scholastic difficulties. Following her suicide, her parents sued the defendant claiming that he failed to secure emergency psychiatric treatment, failed to advise them of the student's true mental state and failed to provide proper student guidance.

The first question was whether Mr. Iverson had a legal duty sufficient to sustain the action. The court noted that when a child is in school and deprived of the protection of parents, the school, in effect, assumes the duty to afford that same protection. However, in this case, there was no evidence that Jeannie ever said anything to the defendant to indicate that she was contemplating suicide. He was providing guidance to her and eventually suggested that those sessions be terminated but there was no evidence that ending the guidance in any way caused her death.

The basic theory was the foreseeability of the girl's suicide as the proximate result of this defendant's negligent conduct. Focusing upon the issue of causation, the court said that a proximate cause is one which involves the idea of necessity. Remote cause is one which no certain conclusion can be legitimately drawn between the claimed cause and the effect. In this case, the court concluded that there was no basis for the conclusion that defendant's actions caused the death except those based upon speculation.

A 1991 Maryland case[10] comes closer to imposing such a duty. A thirteen-year-old middle school student (Nicole) became involved in Satanism, causing her to become obsessed with death. During the week before her suicide, she told several friends about her intent to take her own life. Some of the friends reported to a school counselor who relayed the message to Nicole's own counselor. Both counselors questioned Nicole about the statements, but she denied making them. Neither counselor notified her parents nor the school administration. Her father sued, alleging negligence by both counselors. The trial court dismissed the complaint on the basis that public policy considerations precluded legally recognizing a duty by the school to intervene for the purpose of attempting to prevent suicide.

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[9] *Bogust v. Iverson,* 10 Wisconsin 2d 129, 102 NW 2d 228 (1960).

[10] *Eisel v. Board of Ed.*, 324 Md. 376, 597 A.2d 447 (1991).

On appeal, the Maryland Court of Appeals concluded that it is an "open question" whether there is a duty to attempt to prevent an adolescent suicide. The case was returned for trial to let the jury determine whether the inaction by educators was a cause of the student's death. Several of the facts are very important to our analysis:

(1) The counselors had actual notice of the student's suicidal intent;

(2) Maryland had adapted a statewide youth suicide prevention program - which may have imposed a specific duty on the counselors;

(3) The court found the suicide to be foreseeable by the counselors, based on what they knew. Also the counselors had a "special relationship" with Nicole - an idea which stems originally from a custodial relationship, such as a hospital or jail. The concept does not normally apply to out-patient services. Nicole's parents advanced the theory that failure to communicate the risk prevented them from taking action to avoid it. The relation of the school counselors to Nicole was *in loco parentis*, (in place of the parents).[11]

(4) When balancing the competing interests, the court found that because of the irreversible harm which could flow from not

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[11] "The negligence relied on is a failure to communicate to the parent information allegedly possessed by the defendants concerning the child's contemplated suicide, not a failure by the school authorities physically to prevent the suicide by exercising custody and control over Nicole. The theory of Eisel's case is that he could have exercised his custody and control, as parent, over Nicole, had he been warned, and inferentially, that there was nothing known to the counselors about Eisel's Relationship with Nicole that would make such a warning unreasonable." 384 Md. at p. 384.

> telling the parents, the need to tell the parents clearly outweighed the interest in preserving the student's confidence.

The last point is especially important. Questions of confidentiality require a "balancing" of the interests in favor of confidence (preserving the counseling relationship, etc.) against the parental interest in having the information and a chance to act on it. In fact, there is no "balance" - the risks inherent in not telling the parents heavily outweigh any argument the counselor can advance for not telling the parents.

In an Idaho case[12], a school district was found potentially liable for suicide of a high school student. The student's name was Jeffrey Brooks. As part of his English assignments, he was asked to make daily journal entries. After his suicide, the teach read the entries and turned them over to the counselor, who subsequently delivered them to the student's parents. The journal contained entries in which the student alluded to death or depression but made no statement that he was contemplating suicide.

The parents sued the district claiming that: (1) it had a duty to train teachers to recognize potential suicidal behavior, and (2) that the district and the teacher jointly had a duty to seek help for any student who displays suicidal tendencies. The Idaho Supreme Court held that a decision to implement a suicide prevention program, including training teachers, is a discretionary decision and the district was immune from any such liability. However, the court remanded the case to the trial court to determine whether the failure to notify the parents was a breach of duty imposed by Idaho law upon school districts to "protect the morals and health of students."[13]

Conclusion

Counselors should consult the published code of ethics of professional associations to which they belong with particular attention to whether compliance with those standards is a condition of their license or contract.

Section 1983 affords a potential basis for claim, but only in very egregious circumstances where the suicide is the result of a district policy which amounts to deliberate indifference to the student's well-being.

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[12] *Brooks v. Logan, 127 Idaho 484, 903 P.2d 73 (1995)*

Idaho Code s 33-512(4).

Negligence is the most common basis for claims of this type, and those issues revolve about the relationship with the student and the need to keep parents involved and informed. Counselors should not confuse their ethical mandate for confidentiality with privilege, and should understand that the need to keep information private must be weighed against the dire consequences which can flow from failure to inform parents and others of the child's stated intentions to consider suicide.

References

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THE IMPACT OF THE 1997 IDEA AMENDMENTS ON THE IEP PROCESS

by

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The Impact of the 1997 IDEA Amendments on the IEP Process

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The 1997 IDEA Amendments include several new provisions related to the development and implementation of the Individualized Education Program (IEP) for each student with a disability who is eligible for special education and related services under IDEA. One of these changes involves the need to include regular education teachers throughout the IEP process as a means of providing a stronger link to the general education curriculum for students with disabilities. However, the logistics of fulfilling such a requirement is of great concern for most school districts.

What are the new legal requirements?

Proposed Rules 34 C.F.R. § 300.346 (addresses the statutory requirements of § 614(d) (3)(C) and (4)(B)):

(d) ***Requirement with respect to regular education teacher.*** The regular education teacher of a child with a disability, as a member of the IEP team, must, to the extent appropriate, participate in the development, review, and revision of the child's IEP, including assisting in—

(1) The determination of appropriate positive behavioral interventions and strategies for the child; and

(2) The determination of supplementary aids and services, program modifications, and supports for school personnel, consistent with § 300.347(a)(3).

> § 300.347(a)(3) reads as follows:
>
> A statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child and a statement of the program modifications or supports for school personnel that will be provided for the child—
>
> (i) To advance appropriately toward attaining the annual goals;
>
> (ii) To be involved and progress in the general curriculum in accordance with paragraph (a)(1) of this section and to participate in extracurricular and other nonacademic activities; and
>
> (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this paragraph; . . .

Author's Interpretation and Comment:

In essence, there is a new requirement that the regular education teacher will participate in the development, review, and revision of the IEP particularly around the areas of positive behavioral interventions, supplementary aids and services, program modifications, and support for personnel for each student with a disability who either currently participates in the regular curriculum or who may participate in the general education curriculum while the current IEP is in effect. Subsequently, failure to include a regular education teacher in the IEP process may be indicative of a placement decision made prior to the IEP meeting. This decision not to include a regular education teacher suggests a placement that does not include participation in the general education curriculum or education with nondisabled peers to the maximum extent appropriate (least restrictive environment requirement).

How will school districts attempt to meet the requirement of § 300.346 (d)?

A number of suggestions have been made and implemented by school districts attempting to fulfill the requirement around participation of the regular education teacher in the IEP development, review, and revision of the IEP for a student with a disability. These include:

- Use substitute teachers to cover classes while regular education teachers are at IEP meetings.
    - These substitutes can work all day and cover several classes as needed (float) or work only for short periods of the day while a single teacher attends a meeting.
    - These substitutes can cover classes by grade level or for a "team" of teachers.
- Use retired teachers to cover classes while regular education teachers are at IEP meetings.
- Use teachers aides or assistants who also qualify as substitutes to cover classes while regular education teachers are at IEP meetings.
- Use teachers aides or assistants to cover classes while the regular education teacher is out of the room for short periods of time during a meeting (if allowable under state law).
- Have the regular education teacher attend a portion of the IEP meeting and be available if questions arise (if parents approve of the regular education teacher leaving the meeting).
- Provide regular education teachers with more planning time than required under contract. Then use some of this planning time on occasion to hold IEP meetings (the total planning time is still equal to, or greater than, that which is required under contract).

- Use school counselors, reading specialists, or other teachers in the building who are acquainted with the student with a disability and the regular curriculum to fulfill the responsibility of the regular education teacher at the IEP meeting.
- Compensate regular education teachers for time spent in IEP meetings that occur during their planning periods, lunch, or before and after school.
- Develop "teams" of teachers at the secondary level so that one teacher from the "team" can attend the meeting and represent the others.
- Use assigned teacher workdays (as identified on the school district calendar) to hold IEP meetings, and compensate teachers for loss of independent work time on those days.
- Use assigned teacher conference days (as identified on the school district calendar) to hold IEP meetings.

Despite all of these suggestions, other creative means of meeting this requirement exist. Furthermore, few of these suggestions may work when parents' schedules do not allow them to attend meetings during the regular school hours. The need to hold an IEP meeting after school hours may be necessary, and may require additional compensation by the school district for all members of the IEP team, including the regular education teacher.

Teachers and KIDs

Teachers and the 1997 IDEA Amendments: Knowledge, Implementation, and Documentation

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The conference theme, *Legal Rights in Education: Pendulum Swings*, is applicable with regard to special and general education and IDEA '97. In the field of special education, the pendulum has swung once again and now more responsibility for legal accountability is placed on special and general education teachers. For the first time, general education teachers are included in responsibility for developing and implementing the IEP and providing an appropriate education for students with disabilities. Special education teachers will develop, implement, and document programs and services provided by the IEP in more depth than they have been required to do so in the past.

Teachers, especially those who have been teaching for many years, frequently are not informed of current changes in special education law. This is especially true of general education teachers. Special education teachers often are under staffed, have large numbers of students in their class and/or on their case load and frequently do not have even basic technology such as computers available to help them do their jobs. Many schools still require their teachers to hand write IEPs which can be a burdensome and very time consuming job. Those schools which do not require hand written IEPs often do not have an IEP generating computer program to help teachers save time and be more productive in their jobs enabling them to spend more time with students and less on paperwork. IDEA '97 has many requirements that make it necessary for teachers to be more productive while still spending time with students.

IDEA '97 has a great many demands placed on special education teachers and they need to be more informed than ever before of the expectations placed upon them and their general education colleagues.

Knowledge

Teachers need to attend inservice training and other meetings where they receive information appropriate to their job. The school administration has a responsibility to provide helpful, informative training in IDEA '97 to teachers with appropriate materials that teachers can read at a later time. Initially, teachers do not need to be informed of all the components found in IDEA '97. They need to know about issues effecting the classroom such as discipline, collaboration, IEPs, and other key areas.

Teachers have a responsibility to become informed about IDEA '97 by attending inservice training sessions and other meetings, reading handouts and other literature from these sessions, and by seeking information from other sources such as the district special education office and professional organizations. Once such professional organization that provides information and materials is the Council for Exceptional Children. Their publication "IDEA '97: Let's Make It Work" (1998, Reston, VA: The Council for Exceptional Children) is an excellent source of easy to understand information about the law. The Council for Exceptional Children can be reached at: 1920 Association Dr., Reston, VA 20191-1589, voice: 703-620-3660, email: cecpubs@cec.sped.org.

Key issues teachers need to know about include:

- IDEA '97 encourages educators to stop thinking about special education as a place, but rather as a way to help students learn.

- IDEA '97 focuses on the general curriculum. Everyone starts from there. If a student cannot be successful in a general education class with a general education curriculum, then details of changes must be listed on the IEP.
- IDEA '97 provides that all students will be given regular assessments and results reported by report card and/or other periodic reports. Teachers are accountable for student performance even in special education classes.
- IDEA '97 changes some discipline policies. It requires data collection to document behaviors and/or needs and the administration of a functional behavioral assessment leading to the development of a behavior plan as part of the IEP.
- IDEA '97 also focuses on parent involvement; special and general education collaboration; IEP development; mediation; transition; and general education participation in IEP development, implementation, and documentation.

Implementation

Once teachers have knowledge about IDEA '97, implementing its components in the classroom is the next step. School district administrators will probably initiate many policies and practices which teachers will need to implement. In addition to those imposed by administrators, teachers can develop ways to implement the intent of IDEA '97 in their own school and/or classroom.

Implementing components of IDEA '97 such as IEP development and discipline data collection can be done effectively by developing a collaborative environment in which special and general educators work together to develop a program and provide services which enable special education students to be successful in the general education classroom. This goes beyond having two teachers in the classroom during the lesson. It involves sharing responsibility for identifying and documenting a student's strengths and weaknesses, and developing a plan to help that student be successful by using their strengths and improving their weaknesses with support services.

Collaborative lesson planning between special and general education teachers is important to be sure the intent of IDEA '97 is being implemented. The following is a list of things to consider when engaging in collaborative lesson planning. ***Who:*** General Educator, Instructional Assistant, Special Educator, Related Service Personnel, Others. ***When:*** A mutually agreed upon time. ***Where:*** Close to materials and resources, but in a comfortable place. ***Why:*** To plan successful outcomes for students and teachers. ***What:*** Content, division of responsibilities, instructional strategies, modifications, assessment activities, grading criteria, cooperative grouping. ***How:*** Joint lesson plan format, co-planning checklist, other resources as needed (Jorden, JHU, 9/95). Other collaborative tips are on the following pages.

Documentation

Documentation of student performance, discipline/behavior problems, evaluation performance and other issues are very important under IDEA '97. Without documentation, teachers have no way to justify positive or negative comments, statements, progress, or concerns about students.

The following pages include tips and suggestions for documentation forms which some special and general education teachers have found useful.

Seven Steps for Adapting Curriculum and Instruction

Step 1: Select the subject area to be taught.
Step 2: Identify the specific topic to be taught.
Step 3: Briefly identify the curricular goals for most learners.
Step 4: Briefly identify the instructional plan for most learners.
Step 5: Identify learners who will need adaptations in the curriculum or instructional plan.
Step 6: Based on individual learner goals, choose an appropriate mix of adaptations, beginning with the least intrusive.
Step 7: Evaluate the effectiveness of adaptations; monitor and adjust while teaching.

(From: Adapting Curriculum & Instruction in Inclusive Classrooms: A Teacher's Desk Reference. C. Deschenes, D. Ebeling, & J. Sprague, (1994). Trustees of Indiana University Publishing.)

Things to Consider About Student Participation

1. Can the student participate in this activity just like the typical student?
2. Can the student participate in this activity, but with adapted materials or expectations?
3. Can the student participate in the activity, but work on embedded skills such as communication or movement?
4. Can the student be with the group, but working on an activity that fulfills a very different purpose?
5. Can the student be working on a task that is related to her educational priorities, but in a different part of the room than the rest of the students?
6. Can the student do an out-of -class activity during the times when the regular class material isn't relevant to her needs?

(From: University of New Hampshire, I.N.S.T.E.P.P. Project, 1990)

Co-Planning Checklist (Jorden, JHU, 10/94)

What are student needs? What content will we cover?
How will we handle discipline? What are the class rules and procedures?
Who will take attendance? Who else will be assisting in the class?
Who/how will we contact parents? How will we group students?
How will we set up the room? Who will keep the gradebook?
What are our pet peeves? What are important issues to each of us?
What are the lesson objectives? How will information be presented?
How will we know students learned? Who will assess progress?
How will students practice what they learn? How will we assess mastery?
Who will grade the assignments? What materials will we use, who will prepare?
Who will teach, what, when? What modifications or adaptations are needed?

Testing Modification Alternatives

Printed (computer, typewriter, published) vs. handwritten tests and handouts.

Photocopied vs. ditto, digital duplicator, handwritten tests and handouts.

Provide ample space for student response with lines to write on if required.

Present items in a predictable, hierarchical sequence.

Give shorter more frequent tests. Give a sample test in advance (pretest).

Adjust the reading level of the test to meet the student's need.

Use cues (underline, **bold**, *italics*) to emphasize directions, important elements, or key words

Read directions and/or test items. Define unfamiliar or abstract words.

Provide a model of a correct response for each set of test directions.

Use technology for test presentation and/or student response (computers, calculators, etc.).

Change the setting in which the student takes the test.

Allow extended time to complete the test. Monitor students' progress during the test.

Provide a pool of responses for fill in the blank items. Use alternative scoring procedures.

For multiple choice

a. place answers vertically under the question
b. use direct, clear statements and use the number (4), not the word (four).
c. avoid using ambiguous choice such as "all of the above"
d. limit the number of choices to four.

For matching, place an equal number of choices in each column, limit the number of items to 10, place a blank beside each item, and place lengthier items in the left column.

For essay questions, use sub-sections that divide the open ended question, and provide an answer check sheet that lists the components you expect to be covered in the essay.

(from: Gajria, M., Spencer, S., & Hemrick, M. (1994). Teacher acceptability of testing modifications for mainstreamed students. Learning Disabilities Research and Practice, 9(4), 236-243.)

Student Performance Review Adapted by: Dr Wanda J. Routier, 920-788-2302, E mail: 71022.1724@ compuserve.com

Student Name:	**Today's Date:**	**Teacher:**
Return To: **Return By:**	**Mod:**	**Subject:**
Student's Attendance:		

Classroom Behavior	**Yes**	**No**	**Comments**
Arrives on Time			
Stays on Task			
Demonstrates Appropriate Behavior			
Completes Homework			
Completes Classwork			

Additional Comments:

Current Status: Passing Failing

Approximate Grade:

STUDENT BEHAVIOR CHART

By: Dr. Wanda J. Routier, 920-788-2302, E-mail: 71022.1724@ compuserve.com

WEEK OF__________ STUDENT NAME	DATE______ BEHAVIOR	DATE______ BEHAVIOR	DATE______ BEHAVIOR	DATE______ BEHAVIOR	DATE______ BEHAVIOR

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IEP AT A GLANCE

Confidential Student Information

Adapted by: Dr. Wanda J. Routier, 920-788-2302, E-mail: 71022.1724@ compuserve.com

Name:	**Date:**
Case Manager:	**Grade:**
Disability:	**Age:**

Strengths	Needs

Classroom Modifications

IEP Goals and Objectives

GOALS AND OBJECTIVES	PROGRESS Comments and Dates

CASELOAD DATA CHART

By: Dr. Wanda J. Routier, 920-788-2302, E-mail: 71022.1724@ compuserve.com

STUDENT NAME	Grade	IEP Date	Trien. Date	Service Hours	Disab.	Level of Srv.

SPECIAL EDUCATION RECORD OF SERVICE HOURS

By: Dr. Wanda J. Routier, 920-788-2302, E-mail: 71022.1724@ compuserve.com

CLASS: ____________________

SERVICE PROVIDER: ____________________

Student	IEP Service Hrs/Wk D/C	Date	Nature of Service	Start Time	End Time	Total Service Time

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STUDENT MODIFICATIONS CHART

Designed by Ms Sharon Wilcout Computerized by Dr Wanda J Routier, 920-788-2302, E-mail 71022.1724@compuserve.com

Student: ______________________ **Class:** ______________________

IEP Modification	Modification Used
Extended Time for Tests, Assignments, etc.	
Small Setting for Work and/or Tests	
Peer NoteTaker	
Tape Recorder for Dictating Answers/Assignments	
Tape Recorder for Recording Lectures/Classes	
Tests, Assignments may be Read Aloud by Another Person	
Student may read Tests, Assignments Aloud to Self	
Use Visual Teaching Strategies	
Student may Dictate Responses to a Scribe	
Word Processor/Computer may be used	
Short Answers acceptable	
Grade on concept not writing mechanics	
Calculator	
Preferential Seating	
Spelling Aids/Devices/Dictionary	
Ample Wait Time Allowed before Student Answers	
Study Guide of main concepts for assignments, tests, etc.	

TEACHER COMMUNICATION:

How Is It Going? By: Dr. Wanda J. Routier, 920-788-2302, E-mail: 71022.1724@compuserve.com

To:__________________ From:______________________ Date____________

Just a note to keep in touch and see if there is anything you need from me as the Special Education Liaison with your department. Please complete the questions below and return this form to my mailbox. Thanks!

1. *Are you having difficulties, problems, or challenges with any special education students in your classes?* YES NO
If yes, please explain:______________________________________

2. *Would talking together about the student(s) help?* YES NO
If yes, when would be a good time for you to meet?__________________________

3. *Have you had successes with special education students in your classes?* YES NO
If yes, what are they?______________________________________

4. *Is there anything I can do to assist you in meeting the needs of the special education students in your classes?* YES NO
If yes, what do you need?______________________________________

5. *Other comments:*

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Search and Seizure in Public Schools:
An Update of Fourth Amendment Cases

by

Jacqueline A. Stefkovich
Professor, Temple University

The Fourth Amendment to the U.S. Constitution guarantees "the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by government officials. New Jersey v. T.L.O., 469 U.S. 325 (1985), a landmark United States Supreme Court decision handed down on January 15, 1985, addressed the authority of public school officials to conduct searches of students on school grounds and established that students have Fourth Amendment rights.

According to this Court, students' Fourth Amendment rights must be balanced against school administrators' obligations to maintain order and discipline in the schools. Part of this obligation implies keeping schools safe for students. While the T.L.O. decision did not specifically address itself to mass (metal detector, drug testing) and highly intrusive (strip) searches, legal scholars and subsequent courts generally considered such searches to be illegal. In the past few years, several lower courts (Williams, 1991; Widener, 1992; Cornfield, 1992; Dukes, 1992) have upheld such searches in the name of safety.

In the Williams case, a 6th circuit court upheld the strip search of a female student for drugs. Since the first case was decided in 1973, no other court had been willing to uphold such an intrusive search. There had been "strip" searches upheld, but these were minimally intrusive, generally involving only the removal of outer garments such as jackets or shoes. After Williams, two other lower courts (Widener, 1992 and Cornfield, 1992) followed suit, upholding very intrusive searches of students. Both of these cases involved male high school students and both searches were for drugs. In Widener, the student was asked to remove his jeans. In Cornfield, the student was required to remove all of his clothing including his underwear. In both cases, the strip search was conducted in the presence of school officials of the same gender as the student being searched and no drugs were found.

Thus far, such intrusive searching seems to be limited to searches for drugs with a few exceptions. In Mark Anthony B. (1993) a strip search for $100 was not upheld but in Singleton (1995), a strip search and patdown of a male student's crotch area for $150 was legal and the school was immune from section 1983 damages. In McClung (1995), a U.S. district court in Indiana held a strip search of a class for $4.50 illegal. While the school was not held liable for damages because such searching was not custom, the court held that the principal, teacher, and food service worker were not entitled to immunity because a strip search for such a small amount of money was clearly a constitutional violation. But in Talladega (1997), an eleventh circuit court refused to award section 1983 damages for a strip search of two elementary students for $7.00 because it was not necessarily so that school officials would have known such a search was illegal because there was no precedent in the state or circuit.

A federal district court in Virginia used similar logic in refusing to award damages to a veterinary student who was strip searched after being accused of cheating on an exam (Carboni, 1996). On the other hand, in response to concerns about strip searching, seven states have passed laws prohibiting administrators from conducting strip searches in public schools: California, Iowa, New Jersey, North Carolina, Oklahoma, Washington, and Wisconsin.

As for metal detector searches, in Dukes, a New York court was the first to legalize the use of metal detectors in public schools. These searches were for weapons. Since Dukes, other lower courts hearing cases involving cities such as Los Angeles, Chicago, and Philadelphia (People v. Latasha W., 1998; Pruitt, 1996; In the Interest of S.S., 1996; In the Interest of F.B., 1995) and other large districts such as Dade County, Florida (State v. J.A.) have followed suit

Similarly, there is precedent for conducting other types of reasonable searches without individualized suspicion if safety issues are involved. For example, in the California case, In re Alexander B., a small group of students was searched because "someone" in the group was said to possess a gun. The element of danger was considered adequate to justify the search.

This safety-based rationale for conducting non-individualized searches also holds true for drug testing. Until 1995, the lead (Supreme Court) cases addressed the rights of adult employees in work situations (Skinner, 1989; Von Raab, 1989). In school situations, the results were mixed. In general, searches involving mass searching of students for drugs had not been upheld (Odenheim, 1985; Brooks, 1989), however, exceptions were made such as in the case of student athletes (Schaill, 1988).

In 1995, the United States Supreme Court handed down its second opinion on students' Fourth Amendment rights. In this decision, Vernonia School District 47J v. Acton, the Court maintained that drug testing of student athletes without individualized suspicion was legal under certain circumstances. Here, the Court applied a three-tier test making the legality of the search contingent upon: the need for the drug testing, the expectation of privacy of the persons to be tested; and obtrusiveness of the search. The high Court did not rule explicitly on whether or how this decision might be applied to other student groups or to other types of mass searches such as metal detector searches or random locker searches. However, Justice Ginsburg, in a separate opinion, suggested that the Court had reserved its opinion in this issue.

Lower courts have been divided as to whether Vernonia could be extended to the drug testing of groups other than student athletes. In Todd v. Rush (1998), a seventh circuit court ruled that mandated drug testing for students participating in extracurricular activities was legal while Colorado's Supreme Court, in Trinidad School District No. 1 v. Lopez (1998), decided otherwise. The Trinidad court held that Vernonia did not apply to the drug testing of band members because, unlike athletic teams, participation in the band was not wholly voluntary and there was a qualitative difference in the communal undress exhibited by band members as opposed to athletes. Two other federal courts -- in the eighth (Thompson v. Carthage, 1996) and ninth (McGlothlin, 1997) circuits -- have interpreted the Vernonia standard as allowing school administrators authority to search students without individualized suspicion in situations other than drug testing. Below is a list of cases addressing these and other relevant issues.

STRIP SEARCHES IN SCHOOLS

Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821 (11th Cir. 1997). Two second grade girls were strip searched after being accused of taking a missing $7. The court did not rule on the reasonableness of the search but did state that section 1983 damages would not be awarded because school officials would not necessarily have known that the search was unreasonable because there was no precedent in either Alabama or in the 11th Circuit.

Cornfield v. Consolidated High School District 230, 991 F.2d 1316 (7th Cir. 1993). A male high school student was suspected of "crotching" drugs. He was ordered to remove all his clothes and school authorities visually inspected his naked body. No drugs were found, but the search was upheld as reasonable.

Williams by Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991). In a search for drugs, a female high school student was requested to remove her t-shirt and lower her jeans to her waist. The search was upheld.

Tartar v. Raybuck, 742 F.2d 977 (6th Cir. 1991). In a search for drugs, a male student removed his jacket, shirt, and boots, but refused to take off his pants. The search was upheld.

Bilbrey by Bilbrey v. Brown, 738 F.2d 1462 (9th Cir. 1984). A male fifth grade student who was suspected of possessing drugs was ordered by the school principal to remove all clothing except his underwear. The search was upheld as reasonable.

Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), reh'g denied, 635 F.2d 582 (7th Cir. 1980), cert. denied, 451 U.S. 1022 (1980). Following a canine search, eleven junior and senior high school students were strip searched for drugs. While the canine search was reasonable, the strip searches that followed were not.

M.M. v. Anker, 607 F.2d 588 (2d Cir. 1979) The appeals court ruled that the strip search of a high school student for suspected theft was not reasonable in that no theft had been reported and the standard for conducting the search approached probable cause because of the search's intensity.

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Carboni v. Meldrum, 949 F. Supp. 427 (W.D. Va. 1996). A veterinary student was accused of cheating after she had left a make-up test to go to the women's lavatory and the secretary monitoring the test saw someone in the restroom stall with class notes. The student was subjected to a strip search by school officials and filed suit. The court granted summary judgment on the federal claims maintaining that the college was not on notice of violation of a clearly established constitutional right. The court refused to rule on additional state law claims.

Oliver by Hines v. McClung, 919 F.Supp. 1206 (N.D. Ind. 1995). All students in a physical education class were partially strip searched after two students reported a missing $4.50. Students were asked to remove shirts and undergarments. Pants were patted down and, in some instances, waistbands of the pants were checked. The court ruled that the school board and superintendent were not liable because there was no custom or practice of such searches in the school but that the principal, food service worker, and teacher who conducted the searches were liable under section 1983 because such searches were a clear constitutional violation.

Singleton v. Bd. of Educ. U.S.D.500, 894 F. Supp. 386 (D. Kan. 1995). The school's assistant principal partially strip searched a 13 year old middle school student and patted down his crotch area after a woman accused him of stealing $150 from the front seat of her car. The court ruled the search was legal because it was justified at its inception and reasonable in light of the student's age, sex, and the nature of the wrongdoing. Section 1983 claims did not hold since the search was legal.

Widener v. Frye, 809 F. Supp. 35 (S.D. Ohio 1992). A former high school student brought a section 1983 suit against school officials claiming that his Fourth Amendment rights had been denied when school officials subjected him to a strip search for marijuana. School officials asked the student to remove his jeans after they observed that the student was acting "sluggish" and after they detected what they believed to be the smell of marijuana on his person. The court ruled that the search was reasonable as a matter of law.

Allen v. Koon, 720 F.Supp. 570 (E.D. La. 1989). A male high school student was strip searched by the school disciplinarian in the presence of another student and another school employee. The court found the search to be unreasonable.

Cales v. Howell Pub. Sch., 635 F. Supp. 454 (E.D. Mich. 1985). In the search of a female tenth grade student for drugs, a male assistant principal directed a female assistant principal to conduct the search in the presence of a female security guard. The student was instructed to remove her jeans and bend over to examine the contents of her bra. The search was not upheld.

Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977). A New York district court maintained that the strip search of an entire fifth grade class for a reported missing $3.00 was an invalid search.

Picha v. Wieglos, 410 F. Supp. 1214 (N.D. Ill. 1976). An Illinois district court denied defendants' motion for a directed verdict in a case involving the search of a female junior high school student suspected of possessing illegal drugs.

Potts v. Wright, 357 F.Supp. 215 (E.D. Pa. 1973). The defendants' motion to dismiss was denied in part and affirmed in part in this case involving a police woman who searched eight female junior high school students and required these students to strip down to their undergarments after a complaint that a ring was missing.

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State v. Mark Anthony B., 433 S.E.2d 41 (W.Va. 1993). A student was strip searched for money. The search was not upheld because money did not pose the same sort of danger as drugs or weapons.

Rone v. Davies, 655 S.W. 2d 28 (Ky. App. 1983). A male student suspected of possessing drugs, upon request of school officials, removed his jacket and shoes but refused to remove his jacket and underwear. The search was upheld.

D.R.C. v. State, 646 P.2d 252 (Alaska App. 1982). In a search for $55 found missing from a high school locker room, a male student suspected of stealing the money was patted down and asked to remove his jacket and shoes. The missing money was found in his shoes. The court said the search was reasonable.

Farmer v. State, 275 S.E.2d 774 (Ga. App. 1980). The court upheld this search of a male high school student for drugs which were found in the student's underwear. Although conducted by a police officer, the search was reasonable because there was probable cause and the search was incident to an arrest.

People v. Scott D., 315 N.E.2d 466 (N.Y. 1974). Based on a teacher's observation that a male student was frequenting the bathroom, a male teacher who was also the coordinator of school security strip searched the student after discovering 13 envelopes of white powder. Nine pills were found as a result of the strip search, but the court found that the search was not justified.

DRUG TESTING CASES WITHOUT INDIVIDUALIZED SUSPICION

Vernonia School District 47J v. Acton, 515 U.S. 646 (1995). A seventh grade student was not permitted to participate in interscholastic athletics because he refused to submit to the school's drug testing program. The Court ruled that the program was constitutional. There were drug problems in the school and student athletes have a reduced expectation of privacy.

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989). Drug testing of customs agents without individualized suspicion was reasonable because of the government's interest in preventing bribery and misuse of firearms. Because they were subject to fitness and character examinations, agents had a diminished expectation of privacy.

Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989). After balancing the government's need to search against the privacy rights of railroad employees, the court determined that drug testing without individualized suspicion was reasonable in cases involving accidents or issues of safety. Also, because of physical fitness requirements, employees had diminished expectations of privacy.

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Willis v. Anderson Community School Corp., __ F.3d __ (7th Cir. 1998). The 7th circuit court of appeals held that it was unconstitutional for an Indiana school district to have a policy which required the drug testing of all students who are suspended regardless of the offense. The court distinguished this case from Todd v. Rush where students participating in extracurricular activities were tested. In Todd, unlike Willis, participation was voluntary. The Anderson School District's policy required drug and alcohol testing of students who possess or use tobacco, are truant, or are suspended for three days or more.

Todd v. Rush County Schools, 133 F.3d 984 (7th Cir. 1998). Parents brought suit against the Rush County Schools claiming the district's program which required random urine testing for drugs, alcohol, and cigarettes of all high school students wanting to participate in extracurricular activities violated students' Fourth Amendment rights. Citing Vernonia, the court held the drug testing as reasonable.

Schaill v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir. 1988). Random urine testing of student athletes was considered to be a reasonable search because of the school's interest in preventing drug-related injuries, because student athletes are role models for other school students, and because the intrusion into privacy is lessened in light of other physical examinations required of student athletes.

Brooks v. East Chambers Consolidated School District, 730 F. Supp. 759 (S.D. Tex. 1989). The court granted a permanent injunction in the case of a student athlete who was expected to submit to urine testing based on a school policy requiring this test for all students who participate in extracurricular activities. The policy had been passed in light of a general societal problem, but this particular school district had not had such problems. Because there was no compelling need for the search and the search was unlikely to accomplish its objectives, the court deemed the search to be unreasonable.

Anable v. Ford, 663 F. Supp. 149 (W.D. Ark. 1985). The court ruled that urine testing of high school students for marijuana was unreasonable. There were doubts as to the reliability of the tests and visual monitoring of the students urinating was considered to be excessively intrusive.

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Trinidad School District No. 1 v. Lopez, __ P.2d __ (Colo. 1998). Carlos Lopez, a senior band member, brought suit against Trinidad School District claiming that the school's drug testing policy which required all students in grades 6-12 participating in extracurricular activities to submit to random drug testing was unconstitutional. Citing Vernonia, Colorado's Supreme Court held that the policy was not legal because, unlike athletic teams, participation in the band was not wholly voluntary and there was a qualitative difference in the communal undress exhibited by band members as opposed to athletes. This decision represents a departure from the seventh circuit's decision in Todd v. Rush which upheld a similar policy.

Odenheim v. Carlstadt-East Rutherford Regional School Dist., 510 A.2d 709 (NJ Super 1985). A New Jersey superior court ruled that mandated urine testing (for drugs and alcohol) of all high school students as part of their annual physical examination constituted a search under the Fourth Amendment and was unreasonable because it was a violation of students' privacy rights. Such massive searches were also considered to be unjustified in light of the numbers and percentages of students in the school with drug and alcohol problems.

OTHER SEARCHES CONDUCTED WITHOUT INDIVIDUALIZED SUSPICION

Smith v. McGlothin, 119 F.3d 786 (9th Cir. 1997). A school security guard at Orange Glen High School in Escondido, California, received complaints from neighbors that students were smoking near the school. When the guard and Vice Principal McGlothlin arrived at the area, they saw smoke and some 20 students but could not tell which students in the group were actually smoking. They brought the students back to the school and searched them. Beth Ann Smith was found with three knives. School authorities turned her over to the police and a juvenile court judge suppressed the evidence and dismissed the charges. Smith brought action under section 1983 claiming that the search was conducted in an unreasonable manner because students were not asked who was smoking, there was a two-hour delay in searching the students, and there was no individualized suspicion. A federal district court dismissed the case on grounds of qualified immunity. The ninth circuit court ruled that Smith's reasons supporting an unreasonable search were not valid and, hence, McGlothlin was not liable under section 1983. The ninth circuit court cited Vernonia and Alexander B., a California case, as precedent for conducting reasonable searches without individualized suspicion.

Thompson v. Carthage School District, 87 F.3d 979 (8th Cir. 1996). A bus driver saw fresh cuts on a school bus seat and reported them to the principal of Carthage High School in Arkansas. Upon hearing this news, the principal decided to search all boys in grades 6-12. After the search began, students told the principal that there was a gun at school that morning. Students were told to remove their jackets, shoes, and socks, empty their pockets, and place these items on a large table. Students were then searched with a metal detector and patted down if the detectors sounded. Thompson was searched and cocaine was found in the match box he had in his jacket pocket. Even though there had been no individualized suspicion, the search was upheld. The court cited Vernonia to justify the lack of individualized suspicion.

Webb v. McCullough, 828 F.2d 1151 (6th Cir. 1987). On a trip to Hawaii of 140 students, a principal's search of student rooms for alcohol and without individualized suspicion was unreasonable.

DesRoches v. City of Norfolk School Board, 974 F.Supp. 542 (E.D.Va. 1997). When students in a ninth grade art class returned from lunch break, it was reported to the teacher that a student's gym shoes were missing. After looking for the shoes, it was reported to the school security guard that the shoes had been stolen. The guard decided to search all the backpacks of students in the art class and asked if anyone objected. J. DesRoches refused to consent and his backpack was not searched. As punishment for his refusal, DesRoches was suspended for ten days. The Court found the search to be unreasonable and violative of the Fourth Amendment. It reasoned that the privacy interests of the students outweighed the school's need to search for stolen sneakers. Where the governmental interest was not "substantial," as in this case, individualized suspicion was required. The search of the entire class, when not certain that one is guilty, was too broad.

Burnham v. West, 681 F. Supp. 1160 (E.D.Va. 1987). Mass searches of students for drugs, weapons, and stolen items were not reasonable because of the absence of individualized suspicion. The court noted, however, that such searches might have been legal if suspicion had been narrowed to a smaller group, if the school had a history of problems with drugs or weapons, or if there was immediate danger.

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People v. Latasha W., __ P.2d __ (Cal. Ct. App. 1998). The Los Angeles Unified School District has a written policy allowing daily random searches with hand-held metal detectors. School officials may conduct these searches provided they use some sort of neutral criteria in determining who to search. In this case, the assistant principal searched students who were at least 30 minutes late for school and entered the attendance office without a pass. The metal detector beeped on Latasha who was asked to open her pocket. A knife was found. The court cited other states' decisions on metal detector searching as well as the Vernonia opinion in ruling that the search was legal and that individualized suspicion was not required.

Commonwealth v. Cass, 709 A.2d 350 (Pa. 1998). After observing numerous occurrences of what appeared to be suspicious student behavior (frequent phone calls, use of beepers, and carrying large sums of money), administrators at Harborcreek High School in Erie County, requested the state police to conduct canine sniffing of student lockers. Drugs were found in only one of the 2,000 lockers searched. Drug paraphernalia and a small amount of marijuana was seized. The student was called to the principal's office and read his rights. Overturning a state superior court decision, Pa.'s Supreme Court maintained that this search was reasonable under the federal constitution and Article 1, section 8 of the Pa. Constitution. The court pointed out the danger of drugs and students' limited privacy in schools as a basis for its decision.

In the Interest of S.S., 680 A. 2d 1172 (Pa. Super. 1996). During a student-wide metal detector search at a Philadelphia high school, a student was asked place his coat on a table. The school officer scanned the coat and then patted it down. A box cutter was found in the coat pocket. The court noted that individualized suspicion was not needed since this was an administrative search conducted for the purpose of ensuring safety. Also, due to the high rate of violence in the Philadelphia schools, the search was justified and deemed reasonable. Therefore, the search did not violate the Fourth Amendment.

State v. Barrett, 683 So.2d 331 (La. 1996). A high school principal selected classes consisting of "problem students" to be searched by emptying their pockets and dog sniffing. Barrett's wallet alerted the dog. Upon searching the wallet, an officer assigned to the school found $400 in cash but no illegal drugs. Barrett's backpack was searched and a beeper was found. When the officer spoke to Barrett, he responded "I sell drugs." Barrett also told the officer that he drove to school and pointed out his car. The officer asked to look in the car and Barrett agreed. The car was searched and a "roach clip" with marijuana residue was found. When asked if he had a locker, Barrett gave the location of the locker that he shared with a friend. The locker was searched and a "High Times" magazine was found. During the court proceedings, the officer admitted that she did not have individualized suspicion and the initial search was random. However, the court reasoned that the nature of the intrusion of dog sniffing was minimal and the immediacy of the governmental concern for controlling drugs outweighed the student's privacy interest. Thus, the search was reasonable and did not violate the Fourth Amendment.

State v. J.A., 679 So. 2d 316 (Fla. App. 1996). An independent security firm was hired by the school board to conduct searches of district schools with a hand held metal detector. A team arrived at a Florida secondary school class and noticed a jacket being passed to the back of the room. The team retrieved the jacket, scanned it, and found a gun. J.A. was identified as the jacket's owner. The court identified this search as a random, suspicionless, administrative search to further the purpose of keeping schools safe. The nature of search was considered a minimal intrusion and the interest of protecting schools from weapons and violence was immediate. Hence, the search was reasonable and not in violation of the Fourth Amendment.

In the Interest of F.B., 658 A.2d 1378 (Pa.Super 1995). The Philadelphia School District employs police officers to conduct metal detector searches of high school students. The school also conducts random searches of some students which involves students emptying pockets, coats, and bags. One student who was found possessing a knife brought suit claiming that the search was unreasonable. A Pennsylvania superior court upheld the search in that notices about the searches were posted throughout the school thus reducing students' expectations of privacy. In addition, the individual searches were justified at their inception because of the high rate of violence in the Philadelphia schools.

In re Isiah B., 500 N.W.2d 637 (Wis. 1993). As the result of a random search of student lockers, a gun and cocaine were found in Isiah B's coat pocket. Wisconsin's Supreme Court held this search as reasonable because lockers are school property as defined in the student handbook, student locks are not permitted on the lockers, and there was a risk of imminent, serious harm to students and staff.

People v. Dukes, 580 N.Y.S.2d 850 (N.Y. City Crim. Ct. 1992). A New York court ruled that a student's rights were not violated when she was subjected to a metal detector search without individualized suspicion. The metal detector search resulted in a search of the student's book bag whereupon a knife was found.

In re Alexander B., 270 Cal.Rptr. 342 (Cal.Ct.App.1990). A California court ruled that a search of a group of five or six students was reasonable when one unidentified student in the group yelled that someone has a gun. The search was by a police officer and there was exigency.

Kuehn v. Renton School Dist. No. 403, 694 P.2d 1078 (Wash. 1985). Mass searches of students' luggage prior to a field trip were unreasonable because they lacked individualized suspicion.

OTHER RECENT RELEVANT DECISIONS

Bridgman v. New Trier H.S. District 203, 128 F.3d 1146 (7th Cir. 1997). A male high school student exhibited what appeared to be signs of drug use (alleged unruly behavior, dilated pupils, bloodshot eyes, giggling). As a result, he was subjected to a "medical assessment" by the school's Health Service Coordinator and was searched by the school's Student Assistance Program Coordinator who had initially noticed his behavior. A federal circuit court maintained that the search and the ordering of a medical assessment were legal and that the school's policy requiring written reports about student searches was constitutional.

Breeding v. Driscollett, 82 F.3d 383 (11th Cir. 1996). The Assistant Principal of a Florida public high school received information about an impending drug sale. The informant had been told by another student that Breeding, a male student, had hidden the drugs in his coat. Breeding was later called to the office and asked to empty his pockets. The student removed two plastic packets of what appeared to be marijuana. The substance was tested and found not to be marijuana. In accordance with school policy, the student was suspended for possession of a "look-alike" illegal substance. The Court found the informant's tip to be highly reliable since it was detailed and not anonymous. Consequently, reasonable grounds to search existed and the student's Fourth Amendment rights were not violated.

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State v. Angelia D.B.,564 N.W. 2d 682 (Wis. 1997). An assistant principal observed one student with a knife and received information of another student who had a gun. The male school liaison officer was called and spoke with the informant who identified Angelia. The officer approached Angelia and conducted a pat-down. Her backpack was also searched. While Angelia waited in the school office, there was a search of her locker. No weapons were found. When asked, Angelia stated that she did not have a weapon. A search of her person was conducted by the male officer. He lifted up the bottom of her shirt to reveal her waistband. The officer noticed a knife and seized the item. The court weighed the gravity of a concealed knife within a school and the interest in maintaining a safe environment as substantial against the student's expectation of privacy. Therefore, the search was reasonable.

D.I.R. v. State, 683 N.E.2d 251 (Ind. App. 1997). An Indiana high school routinely had an officer at the front door who used a hand held metal detector to check for weapons. A student arrived late, after the officer had locked away the detector. The officer began a manual search of the student's pockets. During the search he discovered marijuana cigarettes, a pipe, and rolling papers. The court recognized that even though students were aware of the metal detector search conducted each morning, it did not provide an implied consent to a more intrusive physical search. Thus, the manual search did not meet the reasonableness standard and was violative of the Fourth Amendment.

In Re: Adam (Ohio App. 1997) (No. 96-L-138). A teacher noticed two students attempting to leave the building and later observed them smoking a substance that smelled like marijuana. The students denied smoking marijuana. The incident was reported to the principal. The students were called into the office and told to empty their pockets. Nothing was found. Believing that he smelled marijuana on the students' clothes, the principal proceeded to search their lockers and the backpacks inside the lockers. A pipe with marijuana residue was found. The court declared the search as "clearly" reasonable and not a violation of the students' rights. Once the student was found smoking, he placed himself in a zone of inquiry which opened the possibility of searches for marijuana. However, the court found a school policy which allowed for the "random" search of lockers to be unconstitutional because the randomness provided for a blanket search which was per se unreasonable.

People v. Pruitt, 662 N.E.2d 540 (Ill. 1996). There were three separate incidents that occurred at three different Chicago public schools. 1) When S. Pruitt walked through a metal detector, the police assigned to the school were alerted that he may possess a metal object. The officers conducted a pat-down and felt a bulge in his pocket. A gun was found on his person. The court determined that the school's metal detector searches were suspicionless, administrative searches conducted as part of a general regulatory scheme to ensure safely. The interest in protecting students from violence outweighed the student's privacy interests which were minimal. Thus, individualized suspicion was not required and the search did not violate Pruitt's Fourth Amendment rights. 2) An officer assigned to the school was informed by security of a student statement which mentioned J. Cheatam had a weapon. The officer had Cheatam brought to the school office and asked if there were anything in his possession that could get him into trouble. Cheatam pointed to his coat pocket and when asked what it was, he told the officer it was a gun. The officer then removed the gun from Cheatam's pocket. The court believed that the informant tip from another student created a reasonable suspicion that justified the intrusion. 3) A teacher notified the school dean of a stranger in the school who was acting suspicious and walking on a staircase that was prohibited for students. The dean confronted the student, Brooks, and took him to an office. After questioning, it was determined that Brooks was in fact a student at the school and not a stranger. After approximately sixty minutes in the office, the dean ordered Brooks to empty his pockets. In finding the search violative of the Fourth Amendment, the court stated that the dean's knowledge that Brooks was a student and the passage of sixty minutes changed the set of circumstances that would have lead to reasonable suspicion. The request for Brooks to empty his pockets was an unparticularized suspicion and was unreasonable.

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44th Annual Education Law Association Conference
Charleston, South Carolina

Richard "Kent" Murray, Ed.D., John A. Brown, Ph.D.,
W. Bradley Colwell, Ph.D./J.D. and Paul W. Thurston, Ph.D./J.D.

"The Pendulum Swings to Accountability: A Review of the South Carolina Education Accountability Act of 1998 and the Illinois Education Accountability Act of 1997"

I. Introduction

"The General Assembly finds that South Carolinians have a commitment to public education and a conviction that high expectations for all students are vital components for improving academic achievement. It is the purpose of the General Assembly in this chapter to establish a performance based accountability system for public education which focuses on improving teaching and learning so that students are equipped with a strong academic foundation. Accountability, as defined by this chapter, means acceptance of the responsibility for improving student performance and taking actions to improve classroom practice and school performance by the Governor, the General Assembly, the State Department of Education, colleges and universities, local school boards, administrators, teachers, parents, students, and the community." (S. C. Education Accountability Act of 1998, Section 59-18-110)

II. District Performance-Based Accountability System (SC)

a. Purpose

b. Development, Approval, and Review of the District Performance-Based Accountability System

c. District Performance-Based Accountability System Components

III. Student, District, and School Assessment

a. Student Assessment

    1. Below Standards Academic Plans (SC)
    2. Social Promotion (IL)
    3. No Pass - No Play Policy (IL)
    4. Learning Standards by Grade Level (IL)

b. School Assessment (SC)

    1. Annual Grading System (Excellent, Good, Average, Below Average and Unsatisfactory)
    2. Annual Reporting System

c. Local Accountability

    1. District Intervention (SC)
    2. Teacher On-Site Specialists, Principal On-Site Specialists (SC)
    3. Education Oversight Committee (SC)
    4. Cost Caps (IL)

d. Administrator Accountability (IL)

    1. Performance-based Contracts
    2. Contract Extension and Renewal
    3. Alternative Route to Certification

e. Teacher Accountability (IL)

  1. Probationary Period
  2. Remediation Plan
  3. Certification Procedures
  4. Alternative Route to Certification

IV. Miscellaneous

a. Public Awareness Campaign (SC)

b. Principal Induction, Assessment, and Training (SC)

c. Phonics Instruction (SC)

d. Class Size Reduction (SC)

e. Increased State Funding (IL)

f. Charter School Revisions (IL)

V. Legal Implications of Accountability Act

REFERENCES

Illinois Education Accountability Act of 1997, Pub. Act 90-548 (1997).

South Carolina Education Accountability Act of 1998, S.C.L. A400-R412-S850 (1998). (For full text version, see http://www.lpitr.state.sc.us/bills/850.htm)

Nielsen, B. S. (1998). *Guidelines for District Accountability Systems*. Columbia, SC: South Carolina State Department of Education.

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THE PENDULUM SWINGS TO ACCOUNTABILITY:
A REVIEW OF THE ROLE OF DUE PROCESS AND PERFORMANCE STANDARDS

Michael T. McCoy, General Counsel, Utah Education Association
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SESSION B.3

School districts should have good evaluation programs. The legal consequences of good evaluation programs substantially favor school districts against all challenges. Even when the educator evaluation program is of marginal quality, the district will prevail. Where an evaluation is used to justify a personnel decision, the cases almost always support the district. Districts lose only when the evaluation program is used improperly or for purposes for which it is not designed. Except when construing a collective bargaining agreement, the courts tend to give the district the benefit of the doubt requiring the aggrieved educator to show that the district's failure to strictly follow the evaluation policy or statute substantially adversely affected the employee's employment rights.

I. WHY EVALUATE EDUCATORS?

Educator evaluation, if it is to be more than perfunctory, should serve at least three purposes. First, evaluation serves to improve educator performance. This is "formative" evaluation. Second, evaluation serves to make personnel decisions. This is "summative" evaluation. Third, evaluation makes public education accountable to parents and the public.[1]

II. INTRODUCTION TO EVALUATION

The earliest example of teacher evaluation is found in a 1659 series of pamphlets published by Charles Hoole, a master of an English grammar school, on how to manage a school.[2] The main criterion for teacher effectiveness was school management. The description implied that if the school was properly managed, then the pupils would have full opportunity to learn; any deficiencies in learning would be the result of pupil irresponsibility. This focus on the teacher as manager continued through the 19th century.

When the main function of the teacher was perceived as enhancing student learning, the whole range of criteria of teacher effectiveness changed. We now evaluate most teachers on the basis of their ability to engender learning in students, and on their ability to cooperate with students, parents and school management.

III. THE LEGAL AND TECHNICAL CONTEXT OF EDUCATOR EVALUATION

The law of teacher evaluation rises primarily in the context of educator disciplinary proceedings or decision making. These proceedings may be based on a collective bargaining agreement, district policy, state or federal law, and involve constitutional considerations.

This paper initially began as a project to outline the law of teacher evaluation. My research was short circuited when I found two NOLPE (now ELA) publications: *The Law of Teacher Evaluation, A Self-Assessment Handbook*, by Perry Zirkel, and *The Law of Teacher Evaluation*, by Lawrence F. Rossow and Jerry Parkinson. Perry's book summarizes the law in 18 pages, while Larry and Jerry's monograph accomplishes the task in 77 pages.

IV. EVALUATION STANDARDS

Basic criterion for developing a good evaluation program is set forth in *"The Personnel Evaluation Standards, How to Assess Systems for Evaluating Educators."*[3] The technical standards for validating an evaluation program are in *"Standards for Educational and Psychological Testing"*[4] ("SEPT") prepared by the Educational and Psychological Testing of The American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education. There are many how-to-do-it books. One of the best is by Kenneth D. Peterson, *"Teacher Evaluation, a Comprehensive Guide to New Directions and Practices."*[5] The book is particularly good for practitioners who are not experts.

While the discipline of personnel evaluation contains many esoteric terms, the most important is "validity." The SEPT definition is "[t]he degree to which a certain inference for a test is appropriate or meaningful."[6] The *Personnel Evaluation Standards* define "valid measurement" as "the measurement procedures . . . chosen or developed and implemented on the basis of the described role and the intended use, so that the inferences concerning the evaluatee are valid and accurate.[7] Michael Scriven states that, "A test is valid if it measures what it purports to measure," a definition which entails that if you describe a test in different ways its validity will vary.[8]

While educator evaluation has always been part of the public school system, it was not until the late 1960's that the courts became involved in a more than perfunctory way in personnel evaluation. Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of their race, color, religion, sex, or national origin. In a number of early cases, educators were successful.[9]

Cases requiring valid selection, retention, and promotion criteria encouraged professional evaluators to develop valid evaluation programs.[10] The Equal Employment Opportunity Commission (EEOC) developed Uniform Guidelines on Employee Selection Procedures[11] which justified disparate hiring practices. The best defense to a civil rights complaint was to show that the hiring, promotion and termination criteria were the result of a legitimate business need. Key to EEOC approval is the validity of the test. The Guidelines provide in part:

> The provisions of these guidelines relating to validation of selection procedures are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards for Educational and Psychological Tests . . . .

Incentive was given test validation in a case where the employer had hired an industrial psychologist to validate the job-relatedness of its testing program. The Supreme Court measured the validation process against the Uniform Guidelines and found them to be defective in several aspects. The court reiterated that the guidelines were "entitled to great deference."[12]

However, the early emphasis on validity has not been followed.

In a number of relatively early civil rights decisions, where the plaintiffs were minority group members, the courts rejected the use of the National Teacher Examination (NTE) as a prerequisite for a teaching certificate and as the basis for nonrenewal because of the lack of validation for these respective purposes. However, the courts generally allowed the NTE for differentiating salary levels, in light of their validation in relation to teacher training. This split of judicial authority is close--in terms of court level and factual focus--with a slight trend toward more latitude for such testing. For example, toward the end of this period of civil rights litigation, a federal appeals court allowed the use of a teacher competency test as a requirement for admission into teacher education programs despite disparate racial results. The controlling criterion of validity evidence stems from constitutional and statutory sources that are largely unavailing where the issue is not racial.[13]

Few cases hold that the evaluation must be valid, i.e., the inferences drawn from the evaluation must have something to do with the job. The courts appear to accept "facial validity." Facial validity means that just looking at the evaluation criteria appears to have something to do with the job the person is expected to do. Outside the area of civil rights, it appears that only Nebraska[14] has expressly adopted a requirement that evaluation of school employees be job related. The Nebraska Supreme Court held that the "job relatedness test" was met where: (1) the principal with 26 years experience had conducted two evaluations in which a teacher was judged to have been performing below district standards when compared to other teachers evaluated using the same instrument, and (2) the superintendent testified that he had developed the evaluation form in consultation with two of his professors, and observed the teacher in interactions with students on two different occasions having difficulty controlling the students. He had not observed that type of problem with other teachers.[15]

Given the impetus of the initial court decisions in the area coupled with EEOC guidelines and the technical advances made in personnel evaluation, it might be expected that the courts would begin to require evidence of test validity. That has not happened[16] for at least two reasons: first, except for a 1997 Alabama district court decision,[17] courts have not insisted on test validity as a criteria for decision making as developed in the early line of civil rights cases, and second, requiring school districts to develop valid evaluation programs "consistent with generally accepted standards for evaluating standardized tests" may be too costly.

V. CAUSES OF ACTION BASED ON EVALUATION

Educators may bring a cause of action against a public sector educational employer in which the educator's evaluation forms a part of the cause of action based on state law, district policy, or a negotiated agreement.

A. State Law

Courts will find a cause of action against a school district if state law expressly or implicitly provides for evaluation as a precondition to disciplinary actions regarding an educator's employment.[18]

Where a statute fails to link evaluation to employment decisions, courts look to the legislative purpose, which may be recited by the legislature, found in the legislative discussion, or by judicial construction.[19]

B. Remedies Under State Law

In the absence of a clear legislative intent to provide a remedy for violating the requirements of the evaluation law, the majority of courts considering the question have refused to find a cause of action.[20]

C. Judicial Remedies for Violation of State Law

Where a cause of action based on violation of the evaluation law has been found, the courts have not always considered the remedy to be reinstatement:

> Stated from a different perspective, it is not going to work to [administrator - petitioner] long-term advantage to reinstate her. It is inevitable, if the remedy of reinstatement were forced upon respondents, that they would then, for the next succeeding year, give section 44951 notice after having performed timely the Stull Act evaluation. Thus, petitioner would ultimately be right back in the classroom with no real benefits having accrued to either of the antagonists during the interval.[21]

Educators were successful in some cases in enforcing the procedural requirements of educator evaluation statutes and state regulations[22] especially where the purpose of the statute was found by the court to be for the protection of educators,[23] but more recently the trend has been to support the district finding that the district had been in substantial compliance, the error was harmless, the statute was merely directory, or the evaluation law was inapplicable.[24] Even where state law confers a right on an educator, the right may be waived.[25]

D. Board Policy

Several courts have found a cause of action based on the rules of the school board. To be binding on the board, the policy must confer a right on the employee asserting the right. The analysis the courts have applied is similar to that for interpreting statutes. If the purpose of the rule is to protect the employee, courts tend to find a cause of action.[26] If the court finds that the language of the evaluation policy is to protect the employee from an arbitrary disciplinary action, the courts will support a claim that the evaluation is a precondition to the disciplinary action. If the court finds that the purpose of the policy is not to protect the employee, but to provide direction to management or improve management procedures, the court will not provide a remedy for educators who claim rights under the evaluation policy.[27]

E. Remedies for Violation of Board Policy

The remedy for violating a board evaluation rule varies significantly from reinstatement with and without tenure, backpay, and prospective relief.[28]

F. Governmental Immunity

Actions against school districts have been dismissed on the basis of sovereign immunity. Negligent evaluation sounds in tort and is immune from suit under statutes conferring immunity on discretionary acts.[29]

VI. CONTRACT (COLLECTIVE BARGAINING)

Educator evaluation has different considerations in states with collective bargaining laws or where evaluation is part of a negotiated agreement. While many of the issues addressed in this section could have been and are addressed elsewhere in this paper, the focus here is on the relationship of educator causes of action for violation of a negotiated agreement and the relationship of collective bargaining laws to educator evaluation.

> Where collective bargaining is required or permitted, the threshold issue is whether teacher evaluation is a negotiable issue. The typical test is one of balancing the teachers' conditions of employment against the board's managerial prerogatives. The resulting categories are: 1) mandatory topics, which require good faith bargaining upon the initiation of either party; 2) permissive topics, which require good faith bargaining upon the initiation of either party; and 3) illegal topics, which are not enforceable in terms of either the process or product of bargaining.[30]

A. Nontenure Educators

Perhaps not surprising is that a good many provisional educators have sought protection in evaluation provisions in collective bargaining agreements. Boards of education find it difficult to resist such reasonable demands as "provisional educators shall be evaluated at least 'n' times each year and advised of the results." Not surprisingly, union attorneys argue that this creates some kind of job protection. The contractual effect of this language is discussed above. In the case of collective bargaining, the case law is discouraging for provisional educators with a majority of the courts holding that the evaluation provisions in the collective bargaining agreement (1) cannot interfere with the board's authority to "nonrenew" a provisional contract educator's employment,[31] or (2) at best, awarding an educator another year's employment during which the evaluation procedure is to be followed.[32]

It is common in states with collective bargaining laws and mandatory evaluation laws for courts to hold that the issue of tenure cannot be subject to arbitration.[33]

Other states have been more tolerant in permitting a board of education to link tenure, evaluation, and arbitration. Some courts have adopted the scope of review found in the *Steelworkers* trilogy.[34] The Supreme Court of Montana has held that the failure of a teacher to challenge a poor evaluation through the grievance process precluded his challenge to the evaluation when it was used as a basis for termination.[35]

B. Tenured Educators

Generally, where a collective bargaining agreement provides for the evaluation of employees covered by the agreement as a precondition to disciplinary decisions, the courts will enforce compliance with the agreement.[36] Evaluation requirements in collective bargaining agreements are more likely for the benefit and protection of educators covered by the agreement and where the agreement requires evaluation as a precondition to disciplinary action, the courts are likely to enforce the provisions of the agreement.[37] Typical remedies for breach of the collective bargaining agreement is an additional year of probation and compliance with the evaluation procedures.[38]

Most courts enforce mandatory evaluation procedures contained in a collective bargaining agreement against the defense that the provision infringes on the board's authority to make employment decisions.[39] The Illinois Supreme Court[40] and the Kansas Court of Appeals[41] follow the view that because state law confers the unfettered power to dismiss or not renew provisional educators, a collective bargaining provision requiring evaluation purporting to restrict the discretionary power of the board is unlawful.

Courts generally enforce school board policies adopted prior to entering into an employment contract.[42] Courts examine the contract language to determine whether the contract of employment has incorporated the board policy. If the contract states that the contract is "subject to" state laws and board rules, the clause does not create rights or remedies in addition to that provided by statute.[43] The analysis for breach of contract resembles that for implied remedies in state agency rules. If a contract is "subject to" the laws of a state, and the state law requires evaluation but does not provide any remedy for failure to evaluate and does not connect evaluation with employment, then there is no remedy for breach of contract for failure to evaluate.

Employment contract provisions providing rights to probationary educators in addition to those provided by statute, absent a plain and clear restriction in state law, will be upheld.[44]

Where a tenured educator is able to take his/her case to arbitration and wins the arbitration award, courts tend to uphold the arbitrator's decision.[45]

VII. DEFERENCE TO SUPERINTENDENT OR BOARD EVALUATION

Assuming the court finds an employee right in either state law or board policy, how closely will the court scrutinize the criteria the district uses to evaluate the educator? Courts are reluctant to substitute their judgment for that of elected officials whose job it is to manage the public schools. It is far easier for a court to examine a procedural rule and determine whether or not it was violated than for a court to examine the merits of an evaluation program. Historically, the test applied by most state courts is this: is the test defensible? If the test is defensible, it meets the judicial standard for test validity. In a 1945 Ohio decision, the court held:

> . . . the board had before it the testimony of the teacher's supervisor, under whose supervision and observation she had been for fourteen (14) years; to evaluate her services as to efficiency he must be given the legal status of an expert witness . . . .
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> * * *
>
> . . . the board had a legal right to believe this testimony and to base its decision, as it obviously did, thereon, this court has no power under the appeal statute to inquire into and find as in an original hearing whether the grounds for termination existed; finding there was substantial legally competent evidence as a basis for the board's action, nothing remains for the court but to affirm the same.[46]

While the courts may find that a statute imposes an evaluation requirement, the courts have not required that the district demonstrate the validity of the evaluation. It appears that the courts will accept almost any statement from a credible witness that the evaluation is adequate. Outside the early civil rights cases, test validity has not been required by the courts.

VIII. SUBSTANTIAL COMPLIANCE

Even where the district does not comply with the letter of state law or its own policies, courts tend to look to whether the district has substantially complied with evaluation law and whether the employee was substantially adversely affected by reason of the district failure.[47]

The argument that a district has substantially complied with the provisions of a collective bargaining agreement and is therefore entitled to prevail holds less weight where the district has violated the requirements of a collective bargaining agreement. Where the district violates the provisions of a collective bargaining agreement, the standard of review is based on principles of contract law. If the dispute is subject to arbitration, the principles of labor law apply. In either case, the educator has a much better chance of prevailing than when the educator's claim is grounded in statute or board policy. See Contract (Collective Bargaining) above.

IX. CONDUCT NOT SUBJECT TO EVALUATION

Often, school authorities resist evaluation and the procedures involved because an evaluation program usually requires time to evaluate and for remediation. The courts have consistently held that some conduct is not remediable and therefore not subject either to evaluation or remediation. A classic example often given by opponents of evaluation is the claim that child abusers will claim protection under the evaluation laws. There is no case that holds that a district must evaluate the quality of child abuse as a precondition of termination. The courts have held that nonremediable conduct need not be evaluated. Courts have held that evaluation has no place in cases involving moral turpitude or other charges not directly associated with classroom performance,[48] sexual or physical abuse, a counselor's breach of several students confidences,[49] in RIFs,[50] willful neglect of duty or dishonesty,[51] for other reasons unrelated to the teacher's evaluation,[52] difficulties in coaching sports, not on the basis of classroom performance,[53]for remedying only those deficiencies in *scholastic performance* noted *during* their evaluations,[54] and for evident unfitness for service and persistent violations of school rules.[55]

X. EVALUATION AS NOTICE

Almost all states have laws which require that tenured educators receive some kind of warning notice that the educator's employment will be terminated if improvement is not made. The trend has been to extend the notice requirement to provisional educators. Educators often resist the proposed termination arguing that (1) the written notice required by the statute was not given or (2) the notice was inadequate. The written evaluation has been held to satisfy both requirements by many courts.[56]

XI. CONSTITUTIONAL ISSUES

Another argument advanced against having policies which require the evaluation of educators is that the policy will create a "property interest" requiring the district to provide due process and strictly follow the policy. To the extent that the evaluation policy or law is integrated into the teachers' termination law, due process may arise.[57]

In early cases the argument that a state agency's failure to abide by its own rules constituted a denial of due process.[58] Most courts have found that a school district does not deny a probationary teacher due process when it does not renew the teacher's contract because the teacher has no property interest in continuing employment.[59]

To the extent that the evaluation policy or law stands alone, the cases generally hold that no due process right is created by an evaluation requirement.[60]

XII. EVALUATION CASES LOST BY SCHOOL DISTRICTS

While this paper argues there are few legal reasons for school administrators to oppose educator evaluation, educators have been successful against school districts that (1) abuse the purpose of evaluation,[61] or (2) fail to follow required procedures.[62] School districts generally prevail where the substance of the evaluation is challenged.[63]

XIII. REASONS FOR NOT ADOPTING STANDARDS

Courts have not imposed strict evaluation standards for educator evaluation for three reasons: (1) Evaluation is more an art than a science;[64] (2) Courts are reluctant to substitute the judgment of the court for that of the elected board of education;[65] and (3) Developing "valid" evaluation may cost too much.[66]

XIV. CONCLUSION

Evaluation programs serve at least three useful purposes: First, educator improvement; second, to make defensible personnel decisions; third, to provide accountability to parents and the public. Good evaluation practices protect school boards against claims of discrimination. While evaluation programs that fully comply with the requirements of the SEPT might be difficult and expensive to attain, the courts have demonstrated considerable leniency in differing both to the criteria used by school districts and the accuracy of the evaluation program. In cases where the school district had sought to terminate teachers based on the legitimate use of the evaluation program, they have usually prevailed. Moreover, "valid" evaluations serve to protect the district against claims of discrimination, retaliation, and violations of constitutional rights.

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[5] Corwin Press, Inc., Thousand Oaks, California 1995

[6] *Id.* at 94

[7] *Id.* at 83 and 98

[8] Scriven, Michael, *Evaluation Thesaurus*, 4th Ed. Sage Publications, 1991, p. 372

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9 *Singleton v. Jackson Municipal Separate School Dist*, 419 F 2d 1211 (5th Cir 1969), *Hobson v. Eaton*, 399 F 2d 781, 784 n 2 (6th Cir 1968), *Jones v. Pitt County Bd. of Ed.*, 528 F 2d 414 (4th Cir 1975), *Chance v. Bd. of Examiners*, 330 F Supp 203 (S D N Y 1971); *Armsted v. Starkville Municipal Separate Sch. Dist*, 461 F 2d 276 (5th Cir 1972) *Georgia Ass'n. of Educators v. Nix*, 407 F Supp 1102 (Ga 1976), *Allen v. Alabama State Bd. of Educ*, 976 F Supp 1410 (D Ala 1977)

10 *See e.g., Allen*, fn 8

11 29 CFR § 1607 1

12 *Albemarle Paper Co. V. Moody*, 422 U S 406 (1975), *See also Griggs v. Duke Power Co*, 401 U S 424 (1971) (holding that employment tests must be a "reasonable measure of job performance" and that the Uniform Guidelines were entitled to "great deference")

13 *Op. Cit* Zirkel, p 2 at 6

14 *Boss v. Fillmore County Sch. Dist. No. 19*, 251 Neb 669, 559 N W 2d 448, 116 Ed Law Rep 380, 12 IER Cases 864 (1997), *Boss v. Fillmore County Sch. Dist. No. 19*, 4 Neb App 624, 548 N W 2d 1, 109 Ed Law Rep 949 (1996), *Eshom v. Bd. of Educ. of Sch. Dist. No. 54*, 219 Neb 467, 364 N W 2d 7, 23 Ed Law Rep 737 (1985), *Schulz v. Bd. of Ed. of Sch. Dist. of Fremont*, 210 Neb 513, 315 N W 2d 633, 2 Ed Law Rep 842 (1982), *Hollingsworth v. Bd. of Ed. of Sch. Dist. of Alliance*, 208 Neb 350, 303 N W 2d 506 (1981), *Sanders v. Bd. of Ed. of South Sioux City Community Sch. Dist. No. 11 in City of South Sioux City, Dakota County*, 200 Neb 282, 263 N W 2d 461 (1978) Tennessee appears to have adopted a similar standard by statute See *Williams v. Pittard* 604 S W 2d 845 (Tenn 1980)

15 *Op. Cit. Eshom* fn 13

16 Scriven, Michael, "Summative Teacher Evaluation," in *Handbook of Teacher Evaluation*, ed Jason Millman (Sage Publications, 1981), p 244, *See also Op Cit*, fn 2, *The Joint Committee on Standards for Educational Evaluation*, at p 8, " despite its centrality, educational institutions have often been ineffective in carrying out their personnel evaluation responsibilities * * * Testimony presented at public hearings on an earlier draft of this book was replete with charges, and examples, that personnel evaluations repeatedly have been invalid, superficial, and ineffective "

17 *Op. Cit Allen*, fn 8

18 *Hahn v. Bd. of Ed. of the Alvord Unified Sch. Dist*, 252 Cal Rptr 471 (Cal App 1988), *Fries v. Wessington Sch. Dist.*, 307 N W 2d 875 (S D 1981), *Tarquin v. Comm'n on Professional Competence*, 148 Cal Rptr 522, 84 Cal App 3d 251 (1978), *Wojt v. Chimacum Sch. Dist*, 9 Wash App 857, 516 P 2d 1099 (1973), *Knudson v. Boundary County Sch. Dist*, 656 P 2d 753 (Idaho 1982), *Sch. Dist. No. 1, Multnomah County v. Nilsen*, 534 P 2d 1135, 1141-42 (Or 1975) (where the legislative purpose was found to be to protect educators' rights), *Schaub v. Chamberlain Bd. of Ed*, 339 N W 2d 307 (S D 1983) (effectively reversing *Fries)*

19 *Smith v. Sch. Dist. No. 45*, 63 Or App 685, 666 P 2d 1345 (1983), *Roberts v. Lincoln County Sch. Dist. No. One*, 676 P 2d 577 (Wyo 1984), *Leonard v. Converse County Sch. Dist. No. 2*, 788 P 2d 1119, 59 Ed Law Rep 534, 5 IER Cases 537 (Wyo, Mar 13, 1990), *Broadbent v. Bd. of Educ. of Cache County Sch. Dist*, 910 P 2d 1274, 106 Ed Law Rep 1373 (Utah App 1996)

20 *Id.*

21 *Op. cit., Hahn*, fn 17, See, e g *Snyder v. Mendon-Union Local Sch. Dist. Bd. of Educ.*, 75 Ohio St 3d 69, 661 N E 2d 717 (Ohio 1996), *In re Matter of Selby v. North Callaway Bd. of Educ*, 777 S W 2d 275, 56 Ed Law Rep 656 (Mo App 1989) (evaluation did not show what happened after period of remediation), *Hyde v. Wellpinit Sch. Dist. No 49*, 26 Wash App 282, 611 P 2d 1388, (1980) (failure to use criteria established by statute) *reh. denied*, 94 Wash 2d 1007 (1980), *Blackburn v. Bd. of Ed. of Breckinridge County*, 564 S W 2d 35 (Ky App 1978) (evaluation appeared to have been prepared as an afterthought), *Cox v. York County Sch. Dist. No 083*, 252 Neb 12, 560 N W 2d 138, 116 Ed Law Rep 781 (Neb 1997), *Op. Cit. Wojt* fn 17 (ordering temporary reinstatement), *Fies* fn 17, *Sanders* fn 13, *Boss* fn 13

22 See, e g *Thompson v. Bd. of Educ. of Henderson County*, 838 S W 2d 390, 394, 78 Ed Law Rep 619 (Ky 1992) (substantive review), *Marshall Sch. Dist v. Hill*, 939 S W 2d 319 (Ark App 1997), *Chicago Bd. of Educ. v. Smith*, 664 N E 2d 113(Ill App 1996) ;*Gilliland v. Bd. of Educ* of Pleasant View Consolidated Sch Dist No 662, 343 N E 2d 704 (Ill App 1976), *Carter v. Craig*, 574 S W 2d 352 (Ky App 1978), *Farmer v. Kelleys Island Bd. of Educ*, 638 N E 2d 79 (Ohio 1994), *Naylor v. Cardinal Local Sch*, 630 N E 2d 725 (Ohio 1994), *Hosler v. Bellefonte Area Sch. Dist*, 395 A 2d 289 (Pa Commw 1979), *George v. Union Area Sch. Dist* 350 A 2d 918 (Pa Commw 1976), *Wilmer-Hutchins Indep. Sch. Dist. v. Brown*, 912 S W 2d 848 (Tex App 1995), i e , *McKenziev. Webster Parish Sch. Bd*, 653 So 2d 215 (La App 1995), *Op. Cit. Fries* fn 17, *Hahn* fn 17, fn 21, *Wojt* fn 17, *cf. Tarquin* fn 21, *Mendon-Union Local Sch. Dist.* fn 20, *Cox* fn 20

23 See, e g , *Op cit. Mendon-Union Local Sch. Dist* fn 20, *Wojt* fn 17, *Thompson* fn 21

24 *See, e.g.*, *Gibson v. City of Cranston*, 37 F 3d 731 (1st Cir 1994), *Goodrich v. Newport News Sch. Bd*, 743 F 2d 225 (4th Cir 1984), *Lamar Sch. Dist. No 39 v. Kinder*, 642 S W 2d 885 (Ark 1985), *California Teachers Ass'n v. Governing Bd*, 192 Cal Rptr 538 (Cal App 1982), *cert. denied*, 465 U S 1008 (1983), *Kruscher v. Sch. Bd*, 555 So 2d 436 (Fla 1990), *Knudson v. Boundary County Sch. Dist*, 104 Idaho 93, 656 P 2d 753 (Idaho 1982), *Vukovits v. Bd. of Sch. Trustees*, 659 N E 2d 174 (Ind App 1996), *Moran v. Bd. of Sch. Trustees*, 501 N E 2d 472 (Ind App 1986), *Randall v. Allison-Bristow Community Sch. Dist*, 528 N W 2d 588 (Iowa 1995), *Marais des Cygnes Valley Teachers' Ass'n v. Bd. of Educ*, 1998 Kan LEXIS 52 (Kan 1998), *O'Connell v. Sch. Dist of Springfield*, 830 S W 2d 410 (Mo 1992), *Nevels v. Bd. of Educ.*, 822 S W 2d 898 (Mo 1992), *Adkins v. Hazelwood Sch. Dist*, 743 S W 2d 869 (Mo App 1991), *Nuzum v. Bd. of Educ*, 417 N W 2d 779 (Neb 1988), *Clinton v. Wake County Bd. of Educ*, 424 S E 2d 691 (N C 1993), *Dore v. Bd. of Educ*, 449 A 2d 547 (N J Super 1982), *Thomas v. Bd. of Educ* Neward City Sch Dist., 643 N E 2d 131 (Ohio 1994), *State ex rel. Martines v. Cleveland City Sch. Dist*, 639 N E 2d 80 (Ohio 1994), *Borman v. Gorham-Fayette Bd. of Educ*, 502 N E 2d 1031 (Ohio 1986), *Dove v. Allen County Educ. Serv. Cent*, 691 N E 2d 1127 (Ohio App 1997), *Winslett v. Indep. Sch. Dist* No 16, 657 P 2d 1208, 9 Ed Law Rep 368 (Okla App 1982), *Vorm v. David Douglas Sch. Dist*, 608 P 2d 193 (Or 1980), *Smith v. Sch. Dist. No. 45*, 666 P 2d 1345 (Or App 1983), *Bd. of Educ. v. Kushner*, 530 A 2d 541 (Pa Commw 1987), *Hamburg v. North Penn. Sch. Dist*, 484 A 2d 867 (Pa Commw 1984), *Bd. of Pub. Instruction v. Pyle*, 390 A 2d 904 (Pa Commw 1978), *cf. Dunson v. Alabama State Tenure Comm'n*, 653 So 2d 998 (Ala Civ App 1995), *Jefferson v. Compton Unified Sch. Dist*, 17 Cal Rptr 474 (Cal App 1993), *Bd. of Educ. of Anne Arundel County v. Barbano*, 411 A 2d 124 (Md Spec App 1980), *Berhorst v. Maries County R-II Sch. Dist*, 805 S W 2d 696 (Mo App 1991), Johnson v. *Indep. Sch. Dist*, 494 N W 2d 270 (Minn 1992), *Op. cit. Broadbent* fn 18, *Roberts* fn 18, *Schaub* fn 17

25 *Abramovich v. Bd. of Ed. of Central Sch. Dist. No. 1*, 46 N Y 2d 450, 386 N E 2d 1077 (1978)

26 *Trimboli v. Bd. of Ed. of the County of Wayne*, 163 W Va 1, 254 S E 2d 561 (1979) (holding that school districts were bound by a policy adopted by the board of education), *Myrtle Springs Reverted Indep. Sch. Dist. v. Hogan*, 705 S W 2d 707 (Tex App 1985) *cert. den* 480 U S 906 (1987) (holding that a board of education is bound to follow the procedures set forth in its own policies), *Belcher v. Jefferson County Bd. of Ed.*, 474 So 2d 1063 (Ala 1985) (holding that a board of education is bound to follow its own self-imposed procedures), *Eyre v. Big Bend Community College*, 36 Wash App 154, 672 P 2d 1270 (1983) (holding that a community college is bound to follow the evaluation procedures it enacted to determine whether to grant tenure), *Lehman v. Bd. of Ed*, 439 N Y S 2d 670 (1981) (holding the evaluation provisions of a circular adopted by the board and circulated to the faculty are binding on the board and reinstating a probationary teacher finding that the right

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to be evaluated constituted a substantial right)

27 *Willis v. Widefield Sch. Dist. No. 3,* 43 Colo App 197, 603 P 2d 962 (Colo App 1979) (where the board's policy stated that the primary purpose of the evaluation requirement was to improve the quality of instruction and evaluation for purposes of decision making was secondary), *Op. Cit. Roberts,* fn 18 (holding that the evaluation policy had no relationship to the decision to terminate the provisional teacher)

28 *County Bd. of Ed. of Shelby County v. Alabama State Tenure Commission,* 392 So 2d 842 (Ala 1980) (termination was inconsistent with evaluation and teacher presented evidence that evaluations were incomplete and invalid), *Wilt v. Flanigan,* 294 S E 2d 189 (W Va 1982), *Lipan v. Bd. of Ed., County of Hancock,* 295 S E 2d 44 (W Va 1982), ***Holland v. Bd. of Ed. of Raleigh County,*** 327 S E 2d 155 (W Va 1985), ***Wren v. McDowell County Bd. of Ed.***, 327 S E 2d 464 (W Va 1985) *Op. Cit. Eyre* fn 45 (reinstatement to probationary status), ***Lehman*** fn. *45* (required board to evaluate educator according to procedures and make a new decision), *McKenzie* fn 21 (holding that the teacher was entitled to reinstatement because the board did not follow its own remediation plan), *Trimboli* fn 45 (reinstatement and back pay)

29 *Op. Cit. Broadbent* fn 18, *Belcher* fn 25

30 Zirkel, *Op. Cit* p 2 Teacher Evaluation is an illegal subject of bargaining See, e g , *United Teachers v. Orleans Parish Sch. Bd.*, 348 So 2d 232 (La App 1977), *cf. Illinois Educ. Ass'n. v. Bd. of Educ.*, 340 N E 2d7 (Ill 1975), *Miller v. Bd. of Educ.*, 752 P 2d 113 (Kan 1988) Educator evaluation is a mandatory subject of bargaining in some jurisdictions by legislation (e g , Massachusetts, Minnesota, and Rhode Island) or by court interpretation of statute *See, e.g., Bd. of Sch. Trustees of Gary Community Sch. Corp. v. Indiana Educ. Employment Relations Bd.*, 543 N E 2d 662, 55 Ed Law Rep 1086 (Ind App 1989), *Evansville-Vanderburge Sch. Corp v. Roberts,* 405 N E 2d 895 (Ind 1980), *Northeast Community Sch. Dist. v. Public Employment Relations Bd.*, 408 N W 2d 46 (Iowa 1987), See e g , Springfield Educ Ass'n v Springfield Sch Dist 621 P 2d 547 (Or 1980), *Milberry v. Bd. of Educ.*, 354 A 2d 559 (Pa 1976), *see* also state legislation in Nevada, New York, and Oklahoma (consultation requirement), *cf. Alton Community Sch. Dist. v. Illinois Educ. Labor Relations Bd.*, 567 N E 2d 671 (Ill App 1992) *Bd. of Educ. v. NEA-Goodland,* 785 P 2d 993 (Kan 1990), *Bethlehem Township Bd. of Educ. v. Bethlehem Township Educ. Ass'n,* 449 A 2d 1254 (N J 1982) (procedures, not criteria) Zirkel, *Teacher Performance Evaluations and Terminations*, paper presented to the National Organization of Lawyers for Education Associations, San Francisco, May 1998

31 *Anderson, et al., v. Bd. of Ed. of the City of Yonkers,* 354 N Y S 2d 521, 531 (1974) *reversed on other grounds,* 77 Misc 2d 904 354 N Y S 2d 521, *also reversed on other grounds* 46 A D 2d 360, 362 N Y S 2d 536

32 *Bd. of Trustees of Junior College Dist. No. 508 v. Cook County College Teachers Union,* 63 Ill 2d 470, 343 N E 2d 473 (1976) (holding that the board's power to terminate a provisional educator was not subject to the procedural requirements of the collective bargaining agreement). *See also Bd. of Trustees of Community College Dist. No. 508 v. Federation of College Clerical and Technical Personnel, Local 1708,* 153 Ill App 3d 37, 505 N E 2d 1264 (1987), *app. den.* 511 N E 2d 425 (holding that the Board could not delegate its authority to terminate employees and that the arbitrator had no authority to order reinstatement or to require the board to comply with the evaluation procedure in the collective bargaining agreement), *Bd. of Ed., North Palos Elementary Sch. Dist. No. 117 v. Williams,* 118 Ill App 3d 256, 454 N E 2d 773, 780 (1983) (holding that an arbitrator could decide the issue involving whether a school board had violated the procedural issues related to teacher evaluation so long as the "arbitrator's authority to interpret and implement the collective bargaining agreement did not extend to any nondelegable rights and duties vested in the Board by statute"), *Bd. of Trustees of Community College Dist. No. 508 v. Cook County College Teachers Union, Local 1600, AFT, AFL-CIO,* 167 Ill App 3d 998, 522 N E 2d 93, 118 Ill Dec 638, 46 Ed Law Rep 653 (Ill App 1987) (holding that because the statute gave the board the authority to dismiss a teacher, that authority cannot be conditioned on the decision of an administrator to make a recommendation or hold a consultation, nor can the power be limited by the preponderance of opinion of evaluators, even though their evaluations may be conducted at the behest of the board), *Newman v. Bd. of Ed. of Mt. Pleasant Sch. Dist.*, 325 A 2d 387 (Del Ch 1974), *reversed on other grounds,* 350 A 2d 339 1975) *Cohoes City Sch. Dist v. Cohoes Teachers' Ass'n*, 40 N Y 2d 774, 358 N E 2d 878 (1976), *Candor Cent. Sch. Dist. v. Candor Teachers Ass'n,* 52 A D 2d 400, 384 N Y S 217 (1976) (holding that an arbitrator could order reinstatement without tenure), *Newark Candor Teachers Union v. Bd. of Ed.*, 149 N J Super 367, 373 A 2d 1020 (1977), Op cit *Illinois Education Ass'n* fn 31 (holding that evaluation provisions of a collective bargaining agreement cannot interfere with board's authority to "nonrenew" provisional educators), *Anderson* fn 30 (holding that the failure to evaluate as required by the collective bargaining agreement is irrelevant to the issue of tenure),

33 *See, e.g., Bd. of Educ. v. Illinois Educ. Labor Relations Bd.*, 629 N E 2d 797 (Ill App 1994), *Bd. of Educ. v. Illinois Educ. Labor Relations Bd.*, 617 N E 2d 790 (Ill App 1993), *Lewis Cent. Educ. Ass'n v. Lewis Cent. Community Sch. Dist.*, 559 N W 2d 19 (Iowa 1997), *Bd. of Educ. v. Fairlawn Educ. Ass'n,* 417 A 2d 76 (N J Super App Div 1980), *In re Teaneck Bd. of Educ.*, 390 A 2d 1191 (N J Super App Div 1978), *cf. Bd. of Educ. v. Round Valley Teachers Ass'n,* 52 Cal Rptr 2d 115 (1996)(nonrenewal) Thus, despite the courts' general pro-arbitration policy, the number of published cases where teacher evaluation has been determined to be arbitrable is limited *See, e.g., Bellflower Educ. Ass'n v. Bellflower Unified Sch. Dist.*, 279 Cal Rptr 179 (Cal App 1991), *Sch. Comm. v. Boston Teachers Union Local 66,* 664 N E 2d 478 (Mass App 1996), *Riverhead Cent. Sch. Dist. v. Faculty Ass'n,* 531 N E 2d 658 (1988), *Clarkstown Cent. Sch. Dist. v. Cacciola,* 558 N Y S 2d 704 (App Div 1990), *Mifflin County Sch. Dist. v. Lutz,* 551 A 2d 396 (Pa Commw 1988), *Oxford Bd. of Sch. Directors v. Pennsylvania Labor Relations Bd.*, 376 A 2d 1012 (Pa Commw 1977), *Sch. Bd. of Seminole County v. Cornelison,* 406 S 2d 484 (Fla App 1981), *Atlantic Educ. Ass'n v. Atlantic Community Sch. Dist.*, 469 N W 2d 689, 140 L R R M (BNA) 2071, 67 Ed Law Rep 1273 (Iowa 1991) (holding that the bargaining agreement did not clearly provide for arbitration of performance evaluations), *overruled Postville Sch. Dist v. Billmeyer,* 548 N W 2d 562, 561-62 (1996), fn 2 "our review of *Atlantic*, reveals language that might be challenged as inconsistent with the prevailing view that doubts about a collective bargaining agreement's terms must be resolved in favor of arbitration To the extent that the analysis in *Atlantic* seems to depart from the precedent, we specifically disavow it", *Op. cit. Milberry* fn 29

34 *Ferndale Education Ass'n. v. Sch. Dist. for the City of Ferndale,* 67 Mich App 637, 242 N W 2d 478 (1976), *City of Beloit v. Wisconsin Employment Relations Commission,* 73 Wisc 2d 43, 242 N W 2d (1976), *Sch. Committee of Norton v. Norton Teachers' Ass'n.*, 23 Mass App 1002, 505 N E 2d 531 (1987)

35 *Thompson v. Bd. of Trustees of Sch. Dist. No. 2, Yellowstone County,* 237 Mont 498, 774 P 2d 412, 54 Ed Law Rep 312 (Mont 1989)

36 Courts have enforced remedies based on a violation of the collective bargaining agreement in *North Clackamus Sch. Dist. No. 12 v. North Clackamus Educ. Ass'n.*, 634 P 2d 1348 (Or App 1981), *Bd. of Ed. v. Patchoque-Medford Congress of Teachers,* 535 N Y 2d 57 (N Y App 1988), *Vermont State Colleges Faculty Federation v. Vermont State Colleges,* 428 A 2d 1110 (Vt 1981), *Id. Ar-We-Va Community Sch. Dist; Bd. of Ed. of Norwood-Norfolk Central Sch. Dist. v. Hess,* 49 N Y S 2d 389 (1979) (upholding the right of an arbitrator to reinstate a part-time teacher who was not evaluated according to the district's negotiated evaluation policy), *Ar-We-Va Community Sch. Dist. v. Long,* 292 N W 2d 402 (Iowa 1980) , *Op. Cit. Eyre* fn 25

37 *See Op. Cit. Patchogue* fn 35, *Broadlabin Teachers Ass'n. v. Broadlabin Central Sch. Dist.*, 469 N Y 2d 217 (1983)

38 *Id.*

39 *See e.g., United Liverpool Faculty Ass'n v. Bd. of Ed.*, 420 N E 2d 386 (N Y 1981) *Op. cit Broadlabin* fn 36, Fyre fn 35, *North Clackamus* fn 35.)

40 *Op. Cit. Illinois Education Ass'n* fn 29 at 340 N E 2d 9.

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41 *Miller v. Bd. of Ed.*, 744 P 2d 865 (Kan App 1987)

42 *Jones v. Palm Springs Unified Sch. Dist.*, 216 Cal Rptr 75, 80 (Cal App 1985) , *Maxwell v. Southside Sch. Dist.*, 618 S W 2d 148 (Ark 1981) (court invalidated a nonrenewal of a probationary teacher's contract for failure to comply with board regulations), Cf *Op cit. Smith* fn 23 (a teacher's contract does not incorporate subsequently adopted policies) , *Myrtle Springs* fn 25, *Belcher* fn 25 (teachers established a cause of action for breach of contract where the board of education did not comply with its evaluation policies)

43 *Op. Cit. Belcher* fn 25, *Myrtle Springs* fn 45

44 *See Averback v. Bd of Ed* 541 N Y S 2d 655, 657, (1989), *Op. cit. Palm Springs Unified Sch. Dist* fn 41

45 *See, e.g., Paramount Unified Sch. Dist. v. Teachers Ass'n of Paramount*, 32 Cal Rptr 311 (Cal App 1994), Shapiro v Sch Dist , 637 A 2d 718 (Pa Commw 1994), *Lacey Township Bd. of Educ., v. Lacey Township Educ. Ass'n*, 613 A 2d 1167 (N J Super App Div 1991), *United Liverpool Faculty Ass'n v. Bd. of Educ.*, 438 N Y S 2d 505 (1981), *Montpelier Bd. of Sch. Comm'rs v. Montpelier Educ. Ass'n.*, 702 A 2d 390 (Vt 1997), *cf Op. Cit. Broadalbin* fn 36, *North Clackamu* fn 35, *Bellflower* fn 32, *Boston Teachers Union* fn 32 (restricted remedy), *Patchogue-Medford* fn 35

46 *Fowler v. Young*, 77 Ohio App 20, 65 N E 2d 399, 402 (1945), *See also Barger v. Bd. of Trustees of Sch. Dist. No. 30*, 494 P 2d 544 (Wyo 1972), *Mackey v. Newell-Providence Community Sch. Bd. of Ed.*, 483 N W 2d 5 (Iowa 1992), *Fender v. Sch. Dist. No 25, Arlington Heights*, 37 Ill App 3d 739, 347 N E 2d 270 (1976), *Wilson v. Des Moines Independent Community Sch. Dist.*, 389 N W 2d 681 (Iowa App 1986), *Gonzalez v. Marion County Education Service Dist.*, 73 Ore App 465, 698 P 2d 1042 (1985), *Busker v. Bd. of Ed. of Elk Point*, 295 N W 2d 1 (S D 1980), *Taborn v. Hammonds*, 91 N C App 302, 371 S E 2d 736, 49 Ed Law Rep 421 (N C App 1988), *reversed on other grounds*, 324 N C 546, 380 S E 2d 513, *McCorkle v. Sunnyside Sch. Dist. No. 201*, 69 Wash App 384, 848 P 2d 1308, 81 Ed Law Rep 1128 (Wash App 1993) (holding that the failure of the district to follow its progressive discipline policy and to note the teacher's inappropriate disciplining of students in his evaluations did not estop the district from terminating the teacher), *Blunt v. State Bd. of Ed.*, 275 So 2d 303 (Fla 1973), *Op. Cit. Eshom* fn 23, *McKenzie* fn 21, *Cox* fn 20

47 *Kurey v. New York State Sch. for the Deaf*, 227 A D 2d 829, 642 N Y S 2d 415, 109 Ed Law Rep 900 (N Y A D 1996) (holding that the statutory dates for completing the evaluation were directory rather than mandatory), *Randall v. Allison-Bristow Community Sch. Dist.*, 528 N W 2d 588, 98 Ed Law Rep 381 (Iowa 1995), *see also Op. cit. Nuzum* fn 23 (holding that the educator evaluation statute which required evaluation and notice to probationary educators as a pre-condition of termination also applied to administrators and that verbal evaluations satisfied the requirement that Nuzum be evaluated at least once each semester The court also held that the language used to inform Nuzum of his deficiencies were such that "one sufficiently educated to hold a teaching certificate should reasonably expect that the failure to remove a deficiency will result in the termination of employment), *but see Tishey v. Bd. of Sch. Trustees of North Newton Sch. Corp.*, 575 N E 2d 1018, 68 Ed Law Rep 1115 (Ind App 1991) (holding that evaluation of a teacher's performance was a precedent to termination of a nonpermanent teacher based on the amendments to Nebraska law), *Op. Cit. Schaub* fn 17, *Moran* fn 23

48 *Bd. of Ed. of Laurel County v. McCollum*, 721 S W 2d 703 (Ky 1987) *See also Pittsburgh U. Sch. Dist. v. Commission on Professional Com.*, 194 Cal Rptr 672, 146 Cal App 3d 964 (1983) (cited in *McCollum*)

49 *Beranek v. Joint Indep. Sch. Dist. No. 287*, 395 N W 2d 123 (Minn App 1986)

50 *Martin v. Sch. Committee of Natick*, 395 Mass 461, 480 N E 2d 625 (1985), *Ferree v. Bd. of Ed. of the Benton Community Sch. Dist.*, 338 N W 2d 870 (Iowa 1983), *Ottawa Education Ass'n. v. Unified Sch. Dist. No. 290*, 666 P 2d 680 (Kan 1983)

51 *Gaulden v. Lincoln Parish Sch. Bd.*, 554 So 2d 152, 57 Ed Law Rep 1403 (La App 1989)

52 *Op cit. Thompson* fn 21

53 *Op. Cit. Roberts* at fn 18

54 *Schofield v. Richland County Sch. Dist.*, 447 S E 2d 189 (S C 1994)

55 *Op cit. Tarquin* fn 17

56 *Valter v. Orchard Farm Sch. Dist.*, 541 S W 2d 550 (Mo 1976), *Ostlund v. Indep. Sch. Dist. No 47*, 354 N W 2d 492 (Minn App 1984) *Op. cit. O'Connell* fn 23 *Nuzum* fn 23

57 *Maddox v. Clackamus County Sch. Dist. No 25*, 293 Or 27, 643 P 2d 1253 (1982) (holding that a probationary teacher hired for a fixed term had a legitimate claim of entitlement under state law to keep his position for a year, as provided in his employment contract, or until terminated for good cause)

58 *See e.g., Brenna v. Southern Colorado State College*, 589 F 2d 475, 477 (10th Cir 1978), *Bignall v. North Idaho College*, 538 F 2d 243, 248-49 (9th Cir 1976)

59 *Levitt v. University of Texas at El Paso*, 759 F 2d 1224 (5th Cir 1985) (no constitutional deprivation of due process where tenured university professor, though entitled to additional procedures under the university's own rules, received the procedure normally required by due process), *Goodisman v. Lytle*, 724 F 2d 818, 820-21 (9th Cir 1984) (procedural and substantive university guidelines for recommendation of tenure do not confer on a probationary teacher a constitutional protected property interest), *Wells v. Hico Indep. School Dist.*, 736 F 2d 243 (5th Cir 1984) (procedures adopted by board, including those requiring evaluation do not confer o a probationary teacher a property interest in continued employment), *Derrickson v. Bd. of Ed. of City of St. Louis*, 703 F 2d 309 (8th Cir 1983) (failure to follow regulations concerning evaluation procedures do not deprive a teacher of due process), *Atencio v. Bd. of Ed.*, 658 F 2d 774 (10th Cir 1981) (no due process violation where a board violated its own policies for discharging superintendent), *Bd. of Ed. v. Morris*, 656 P 2d 258, 262 (Okla 1982), *Papadopoulos v. Bd. of Higher Education*, 14 Or App 130, 511 P 2d 854, *cert. den.* 417 U S 919 (1974) *But see Op. Cit. Maddox* fn 89, *Jones* fn 10; *Piper v. Board of Trustees*, 99 Ill App 2d 752, 426 N E 2d 262 (1981), *Roberts* fn 18, *Schaub* fn 17, *Willis* fn 26

60 *Bd. of Trustees of Community Dist. Number 513 v. Krizek*, 113 Ill App 3d 222, 446 N E 2d 941 (1983), *Johnson v. Indep. Sch. Dist. No. 281*, 494 N W 2d 270, 80 Ed Law Rep 203 (Minn 1992), citing *Nathanson v. United States*, 630 F 2d 1260, 1264 (8th Cir 1980), *cert. denied*, 464 U S 939, *Elkin v. Roudebush*, 564 F 2d 810, 813 (8th Cir 1977), *Stretten v. Wadsworth Veterans Hosp.*, 537 F 2d 361, 366 (9th Cir 1976), and *Ventetuolo v. Burke*, 596 F 2d 476, 483 (1st Cir 1979), *Mackenzie v. Chemeketa Community College*, 106 Or App 707, 810 P 2d 406, 67 Ed Law Rep 808 (1991) *Op. Cit. Roberts* fn 79, *Schaub* fn 17

61 *Orr v. Crowder*, 315 S E 2d 593 (W Va 1983), *Zoll v. Eastern Allamakee Community Sch. Dist* , 588 F 2d 246 (8th Cir 1978), *Bd. of Ed. of the Lordstown Local Sch. Dist. v. Ohio Civil Rights Commission*, 66 Ohio St 2d 252, 421 N E 2d 511 (1981), *Clark v. Mann*, 562 F 2d 1104 (8th Cir 1977), *Napoleon Education Ass'n v. Napoleon Community Sch* , 336 N W 2d 481, 482 (Mich App 1983); *In re Subpoena Duces Tecum and Subpoena of Keith Gillespie*, 348 N W 2d 233 (Iowa 1984). *Op. cit. Thompson* fn. 21

62 *See, e.g., Orth v. Phoenix Union High Sch. System*, 613 P 2d 311 (Ariz App 1980), *Witgenstein v. School Bd* , 347 So 2d 1069 (Fla Dist App 1977), *Kruse v. Bd. of Directors*, 231 N W 2d 626 (Iowa 1973), *Seifert v. Lingleville Indep. Sch. Dist* , 692 S W 2d 461 (Tex 1985)

63 *See, e.g., Pratt v. Alabama State Tenure Comm'n*, 394 So 2d 18 (Ala Civ App 1980), *cert. denied*, 394 So 2d 22 (Ala 1981), *DeBernard v. State Bd. of Educ* , 527 N E 2d 616 (Ill App 1988), *Stamper v. Bd. of Educ* , 491 N E 2d 36 (Ill App 1986), *Harrison-Washington Community Sch. Corp. v. Bales*, 450 N E 2d 559 (Ind App 1983), *Fay v. Bd. of Directors*, 298 N W 2d 345 (Iowa 1980), *Bd. of Directors v. Mroz*, 295 N W 2d 447 (Iowa 1980), *Briggs v. Bd. of Directors*, 282 N W 2d 740 (Iowa 1979), *Rainwater v. Bd. of Educ* , 645 S W 2d 172 (Mo. 1982), *Atherton v. Bd. of Educ* , 744 S W 2d 518 (Mo App 1988), *Hanlon v. Bd. of Educ* , 695 S W 2d 930 (Mo App 1985), *Donnes v. State*, 672 P 2d 617 (Mont 1983), *Crump v. Durham County Bd. of Educ* , 327 S E 2d 599 (N C App 1985), *Davidson v. Winston-Salem/Forsyth County Bd. of Educ* , 303 S E 2d 202 (N C App 1983); *Mongitore v. Regan*, 520 N Y S 2d 194 (App Div 1987), *app. denied*, 526 N Y S 2d 436 (1988), *Faville v. Ambach*, 507 N Y S 2d 310 (App Div 1986), *app. denied*, 517 N Y S 2d 1026 (1987); *Clarke v. Bd. of Educ* , 482 (N Y S 2d 80 (App Div 1984), *Grant v. Bd. of Sch. Directors*, 471 A 2d 1292 (Pa Commw 1984), *Kudasik v. Bd. of Sch. Directors*, 455 A 2d 261 (Pa Commw 1983), *Sanders v. Anderson*, 746 S W 2d 185 (Tenn 1987) *Contra*, Trustees v Anderson, 757 P 2d 1315 (Mont 1988), Schultz v Bd of Educ , 315 N W 2d 633 (Neb 1982) (where the courts reversed terminations for incompetence where their overall evaluations were satisfactory). *Op. Cit Eshom* fn. 23

64 The Court's strict application of the Uniform Guidelines in *Albemarle Paper Co.* drew extensive criticism Indeed, even the American Psychological Association, upon whose standards the Uniform Guidelines were based, joined in the reproach, asserting that an unyielding application of the guidelines would result in "professionally unrealistic and effectively unattainable requirements Brief for the Division of Industrial-Organizational Psychology of the American Psychological Association as Amicus Curiae at 20, *Washington v. Davis*, 426 U S 229 7(1976), reprinted in 88 Landmark Briefs and Arguments of the Supreme Court of the United States Constitutional Law, 281, 309 (P Kurland G Casper eds 1977)

65 *Op. Cit. Chance* fn 11

66 In *Allen v. Alabama State Bd. of Education, Op. Cit. fn. 8*, the Board agreed to develop a test which satisfied the professional standards of the EEOC and Standards Guidelines, then objected on the grounds that compliance would cost too much The National Computer Systems, Information Services submitted a proposal to develop a test for \$1,149,427 and the University of Alabama submitted a proposal for \$805,027 Dr James Popham testified that a custom-made test would cost at least \$2 million to \$3 million or more Dr Poggio estimated that a valid, custom-made test could be developed for \$8,000 to \$10,000 It remains to be seen whether "valid" evaluation programs can be developed at a reasonable cost

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What Mentor-Teachers Need to Know about School Law

by

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Abstract

The literature on mentoring notes the practical value of having prepared mentors to assist the beginning teacher in the role of classroom teacher. In their roles as supervisor, coach, and guide, mentors assume the responsibility of explaining to their proteges the procedural issues surrounding the professional role of teacher. While most of their discussions focus on pedagogical concerns, issues of education law do arise. Mentor-teachers need a current understanding of education law to assist new teachers, most of whom have not received preparation in education law. This responsibility may require mentors to receive formal preparation in legal issues. This paper outlines a fifteen hour professional program, i.e., five three-hour block sessions, that provides mentors general knowledge on relevant topics of education law, in preparation for their mentoring role.

Beginning Teachers' Need for Mentors

The role of mentor serves a critical role in the professional preparation of first-year teachers (American Association of Colleges for Teacher Education, 1995; Cordeiro & Smith-Sloan, 1995; Ganser & Koskela, 1997; Hadden, 1997; Hawkey, 1997; Kajs, Willman, & Alaniz, 1998). Mentors serve as confidants, counselors, coaches, guides, and supervisors to beginning teachers as they struggle with the common problems of the teacher profession (Cordeiro, 1995; Gilstrap & Beattie, 1996; Hadden, 1997; Hawkey, 1997). Veenman, (1984) has identified eight common problem areas of new teachers including classroom management, motivational techniques, student diversity, performance assessment, parental relations, teacher materials and classroom supplies, class organization, and student dilemmas (Niebrand, Horn, and Holmes, 1992, p. 84). Effective mentoring relationships can provide first-year teachers the necessary assistance and support to handle stressful situations, characteristic of turbulent environments (McShulskis, 1997; Nelson & Quick, 1997). Research shows that beginning teachers who participate in successful mentoring relationships experience increased satisfaction and competence in the teaching profession (Thomsen &Gustafson, 1997) and surpass non-mentored teachers in professional growth (Spuhler & Zetler, 1994).

Many of the eight common problem areas (Niebrand, Horn, and Holmes, 1992) have either direct or indirect legal implications and consequences of which beginning teachers may lack awareness or understanding. This would not be unusual since very few undergraduate teacher education programs provide a course in education law (Sullivan and Zirkel, 1998). Patterson and Rossow (1996) found that of the 221 institutions responding to their survey, only 18 "...offered a discrete education law course on the undergraduate level" (Sullivan and Zirkel, 1998, p. 6). These findings are in stark contrast to the results of a survey of Education Law Association (ELA) membership in which 94 percent of the respondents believed "...that teacher education requirements should include an education law course" (Sullivan and Zirkel, 1998, p. 6). Blackmon (1992) found that "...at least 95 percent of schools of education that offered graduate programs in education had at least one course in education law" (Sullivan and Zirkel, 1998, p. 6).

Rationale for Education Law Preparation in Mentor-Teacher Programs

The lack of an education law course in teacher preparation programs has direct implications for mentors. First, most mentor-teachers probably did not receive an education law course in their undergraduate teacher education program. Secondly, if they had completed a course in education law, this information may be outdated depending on the completion date of their teacher preparation program. Thirdly, while mentor-teachers serve in a supervisory role, the mentor selection process usually does not include the requirement of an administrator/supervisor certificate or a master's degree in education which programs usually require a course in education law. Thus, most mentor-teachers probably have not taken an education law course. Lastly, since most first-year teachers have little general knowledge of education law, school administrators may assume that mentors are responsible for providing guidance and explanation to beginning teachers regarding legal matters.

A comprehensive mentor-teacher preparation program should include an education law component. This preparation will serve two purposes. First, mentor-teachers will be better prepared to counsel and guide the beginning teacher in matters of education law. Without this legal knowledge, mentor-teachers may lack the awareness of a problem or the answer to a dilemma, or may lack the confidence to try to handle a critical issue (Hawkey, 1997). Secondly, this preparation can meet mentor-teachers' professional and personal growth needs as part of their lifelong learning development (Chickering, 1994; Cross, 1991). This continuing education process provides opportunities for self-learning and self-renewal in an ever-changing world (Collinson, Sherrill, and Hohenbrink, 1994). Thus, mentor-teachers become active agents of their professional development, a process of self-discovery (Chickering, 1994, p. 3). A professional program sets the occasion for mentor-teachers to seek answers to questions from knowledgeable instructors in a non-threatening atmosphere, as well as to learn from and with colleagues.

Education Law Preparation in a Mentor-Teacher Program

The mentor-teacher program should offer mentor-teachers preparation in education law to assist beginning teachers in their rights and responsibilities as well as those of students. The preparation should incorporate relevant topics of education law (e.g., special education and tort liability) and pedagogical practices (e.g., discussion, group work, and legal research) [Sullivan & Zirkel, 1998]. This professional preparation can take the form of a staff development workshop or college/university course, depending on the expectations and needs of the participants, the sponsoring organization, e.g., school district, and the institution offering the instruction, e.g., university. The following framework is being used to outline a model program, consisting of a fifteen-hour workshop, the equivalency of a one semester-credit-hour (SCH) university course in general knowledge of education law. The workshop or course consists of five (5) three-hour blocks of instruction. The structure of each block includes the learning objectives and the lesson plan, linkage/extension, rationale, and scenario that support each objective. A short explanation of the components is provided as follows:

Learning Objective: The knowledge/skill or ability/attitude students expected to acquire during the class session.

- Lesson Plan: The subject matter/demonstration/interaction provided to meet learning objectives.
- Linkage/Extension: The subject matter/demonstration/interaction presented is linked and extended to other topic(s) in education law.
- Rationale: The purpose of the subject matter/demonstration/interaction in the preparation of mentor-teachers is provided.
- Scenario: The brief example/scenario/situation demonstrates the rationale.

BLOCK ONE: Introduction to the Legal System

1. Learning Objective: Participants will understand the concepts and organization of the criminal and civil systems.

- Lesson Plan: To meet this objective, the subject matter is best conveyed through the use of scenarios that illustrate, among other things, that in the criminal system the parties are the government against the person accused of violating a criminal law, and in the civil system the parties are a moving party bringing suit for a breach of contract or other civil duty against the defending party. Terminology, burdens of proof, and rights of parties can be explored and compared through the use of scenarios.
- Linkage/Extension: All topics
- Rationale: This objective begins the understanding of the structure of the legal system.

- Scenario: A physically beats up B. A is charged with committing the crime of assault. B files suit against A for money to compensate B for his medical expenses, loss of earnings, and pain and suffering. Is it necessary for B to "press charges" for A to be prosecuted in the criminal system? What role does B play, if any, in the criminal prosecution? Can there be both a criminal prosecution and a civil action brought against A arising from the same occurrence? In the civil action, does assault sound in contract or tort? Is it possible for A to be acquitted in the criminal prosecution, but found liable in the civil action? If so, what are the elements of each system that could cause such result?

2. Learning Objective: Participants will understand the relationship between federal and state governments and sources of law (e.g., constitutions, statutes, judicial opinions, administrative regulations, and local district policies).

- Lesson Plan: To meet this objective, the subject matter is best conveyed by a general discussion of federalism, including a discussion of how the United States (U.S.) Constitution grants powers to the federal government, how the Bill of Rights limits powers of the federal government, how the Fourteenth Amendment limits powers of state governments, how the Bill of Rights has been funneled to the states via the Fourteenth Amendment, how the Tenth Amendment acts as a barrier for the federal government to impact education, and how the Tenth Amendment can be pierced to impact powers otherwise reserved to the states. The understanding of sources of law is best conveyed by a description, through the use of lecture and slides, of the origin and function of each source and how each source fits into an overall hierarchy of sources.
- Linkage/Extension: All topics
- Rationale: This objective adds an essential component to the structure of the legal system.
- Scenario: A federal statute prohibits school districts from discriminating against persons on the basis of sex. Does this statute violate the Tenth Amendment? Would it pass muster under the Tenth Amendment if it applied only to districts that receive federal funds? Can it be reasonably argued that without the funding requirement, the statute protected a right under the U.S. Constitution, thus passing muster under the Tenth Amendment? Can you connect this statute to the commerce clause of the U.S. Constitution?

3. Learning Objective: Participants will understand the organization of the federal and state court systems.

- Lesson Plan: To meet this objective, the subject matter is best conveyed by the use of slides that diagram both the federal and state court systems. The accompanying discussion should include an overview of subject matter jurisdiction, geographic boundaries of authority, the functions of trial courts and appellate courts, discretionary appeal writs and the weight given, if any, to opinions that stand after the denial of a writ, and under what circumstances matters can proceed from the state system to the federal system?
- Linkage/Extension: All topics

- Rationale: This objective adds another essential component to the structure of the legal system and assists participants to assess the weight and applicability of judicial decisions.
- Scenario: A teacher sends a student home for misconduct in violation of district policy, state law and due process under the Fourteenth Amendment. Can a suit be filed in federal court? Why? Can a suit be filed in state court? Why? If the suit is filed in state court and the defendant would rather have the matter heard in federal court, can the defendant remove the case from state court to federal court? Can state courts hear federal questions? Can federal courts hear state issues? If the suit alleges that the teacher has only violated the Fourteenth Amendment due process clause because a state statute and district policy permits the teacher's action, can the plaintiffs challenge the statute and policy as in violation of the Fourteenth Amendment? If on appeal, the state's highest court upholds the state statute and district policy, can the plaintiffs appeal to the U.S. Supreme Court? Can the U.S. Supreme Court deny the appeal?

4. Learning Objective: Participants will have a general understanding of the First, Fourth, Tenth, and Fourteenth Amendments to the U.S. Constitution.

- Lesson Plan: To meet this objective, the subject matter is best conveyed by slides and discussion that: (1) describe the gateways through the Tenth Amendment that allow the federal government to impact functions reserved to the states; (2) dissect Fourteenth Amendment due process, both substantive and procedural, and equal protection, together with a discussion of the levels of scrutiny used by courts to review state laws and practices; (3) introduce the free speech, free exercise of religion, and establishment of religion clauses of the First Amendment; and (4) introduce the Fourth Amendment prohibition of unreasonable searches.
- Linkage/Extension: First, Fourth, and Fourteenth Amendments: Student Rights (Block Two); Student Discipline (Block Three); Liability and Immunity (Block Four) Tenth Amendment: Students with Special Needs (Block Five).
- Rationale: This objective acquaints participants with the U.S. Constitutional underpinnings of laws, regulations, and policies that affect public education.
- Scenario: See Blocks Two, Three, Four, and Five.

5. Learning Objective: Participants will have a general understanding of state juvenile justice systems.

- Lesson Plan: To meet this objective, the subject matter is best conveyed by a review of the concepts of the criminal and civil justice systems, followed by a discussion of how juvenile justice systems are a hybrid of the two systems. The link with the Texas school discipline system, Tex. Educ. Code Section 37.001 *et seq.*, (Texas School Law Bulletin, 1998) is best demonstrated by slides of the structure and functions of county juvenile justice boards.
- Linkage/Extension: Student Discipline (Block Three)
- Rationale: This objective acquaints participants with the concept that state juvenile justice systems are a blend of the criminal and civil systems and gives participants an awareness that school discipline systems and juvenile justice systems are separate, parallel systems that sometimes link.

- Scenario: Two eighth grade students are referred to in-school detention for fighting with each other on school grounds. The district has a policy that if two or more students were involved in the fight, all would be referred to detention. It also is the district's policy that the involved students would be referred to law enforcement officials. When law enforcement officials received the referral and investigated the matter for the purpose of whether to prosecute the students in the state juvenile justice system, they concluded that only one of the students should be accused of assault. The other student was not accused. Can the school's discipline system sanction both students when the state accuses only one? If the student accused in the state juvenile justice system is ultimately tried in juvenile court for the offense, might the other student and school employees involved in the occurrence be called as witnesses?

6. Learning Objective: Participants will understand the structure of the Texas public school system.

- Lesson Plan: To meet this objective, the subject matter is best conveyed by slides and accompanying discussion that describes the roles, relationships, and functions of the many components of the system, including the Legislature, the State Board of Education, the Texas Education Agency, the Commissioner of Education, local boards of trustees, superintendents, and principals.

Linkage/Extension: All topics

- Rationale: This objective enhances participants' awareness of the teacher's role in the system.
- Scenario: See Blocks Two, Three, Four, and Five.

BLOCK TWO: Student Rights

1. Learning Objective: Participants will understand how the law governing student rights has evolved from a standard of reasonableness and the mantra of protection under the doctrine of *in loco parentis* to the establishment of protected rights under the U.S. Constitution.

- Lesson Plan: To meet this objective, the subject matter is best conveyed by a discussion of how common law established reasonableness as the fulcrum upon which the student-school relationship is balanced, followed by a discussion of how this common law doctrine gave way via court decisions to recognizing the constitutional rights of students.
- Linkage/Extension: Student Discipline (Block Three); Liability and Immunity (Block Four)
- Rationale: This objective sets the stage for understanding the body of constitutional law that underlies regulation of student conduct, expression, exercise of religion, and searches.

- Scenario: A teacher paddles a student. What provisions of the U.S. Constitution might be violated? Would the Eighth Amendment's prohibition of cruel and unusual punishment apply? Why or why not? Does the teacher violate the student's substantive due process rights under the Fourteenth Amendment? Would the severity of the paddling have any impact on the legal implications? Can the teacher be criminally prosecuted for assault? Can the teacher be sued as a civil matter? Does every civil or criminal wrongdoing by a teacher against a student violate the student's rights under the U.S. Constitution?

2. Learning Objective: Participants will understand the rights students in the school setting enjoy regarding speech, both verbal and non-verbal, as balanced against the authority afforded school districts to infringe upon those rights to maintain an orderly learning environment and as compared to the free speech rights of citizens outside the school setting.

- Lesson Plan: To meet this objective, the subject matter is best conveyed by beginning with an analysis of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733 (1969), which established the material and substantial disruption standard regarding, in this case, nonverbal speech, and which made the famous statement that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." From an analysis of *Tinker*, discussions of rights related to student publications, dress codes, and hair length follows.
- Linkage/Extension: Student Discipline (Block Three); Liability and Immunity (Block Four)
- Rationale: This objective will enable participants to assist their proteges to evaluate and deal with situations involving student expression so as to properly maintain order without infringing on a constitutionally protected student right.
- Scenario: Three students wear rosaries, necklace style, to school. The school principal believes that a rosary worn in this fashion is a gang-related symbol. No disruption in the school results from the students wearing the rosaries. The students are suspended for wearing gang-related apparel, which is prohibited by the school's conduct code. If wearing rosaries in this fashion can not be proven to be a gang-related symbol, does the suspension violate the students' right of free speech? If wearing the rosaries in this fashion proves to be a gang-related symbol, would your answer be different? Does it make a difference that no disruptions arose from the students' conduct? Would it make a difference if the intent of wearing the rosaries were to make a political statement? (See the church/state implications under the next learning objective.)

3. Learning Objective: Participants will understand the rights students in the school setting enjoy regarding the free exercise of religion and the state's establishment of a religion, both components of the First Amendment religious freedom provision.

- Lesson Plan: To meet this objective, the subject matter is best conveyed by beginning with a discussion of the concept of the two components of the First Amendment religious freedom provision: the free exercise clause and the establishment clause.

- Linkage/Extension: Liability and Immunity (Block Four)
- Rationale: This objective enables participants to assist their proteges to distinguish between situations in which students are exercising their right of free exercise of religion and situations in which students are violating the doctrine of separation of church and state. This objective also allows participants to be cognizant of how the protégé might violate the establishment clause.
- Scenario: Assume same scenario as in the previous learning objective. If there has been material and substantial disruption, but the students claim that the rosaries are symbols of their religion, does the suspension violate the students' right of free exercise of religion?

4. Learning Objective: Participants will understand the rights students in the school setting enjoy regarding privacy and unreasonable searches and will understand how these rights compare to the rights of citizens outside the school setting.

- Lesson Plan: To meet this objective, the subject matter is best conveyed by beginning with an analysis of New *Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733 (1985). With *T.L.O.* as a foundation, the discussion will proceed to examination of the standard of cause necessary to search students and their property in the school setting as contrasted to the standard of cause necessary to search citizens and their property outside the school setting. The discussion will then explore search-related subjects such as individualized suspicion, the expectation of privacy, effective consent, articulable facts, reliable sources, general searches, strip searches, canine searches, and drug testing.
- Linkage/Extension: Student Discipline (Block Three); Liability and Immunity (Block Four)
- Rationale: This objective enables participants to assist their proteges to maintain order and enforce rules without trammeling student's constitutionally protected right to be free from intrusions without reasonable cause and individualized suspicion where there is an expectation of privacy.
- Scenario: Several thefts in A's ninth grade art class are unresolved, a class split by a lunch break. When the students break for lunch, B leaves her designer sneakers on top of her desk. When the students return from lunch, the sneakers are missing. The teacher, frustrated by the flurry of thefts, announces that she is going to search every student's backpack. The teacher asks for the students' consent to search. All students except two consent, A and C. When the teacher announces that anyone who refuses consent would be suspended for 10 days, C relents and consents to the search. The teacher searches all the backpacks but A's. A is suspended by the administration, which upholds the teacher's action. Does the teacher have reasonable cause to search everyone's backpack? Does the teacher have individualized suspicion of the students whose backpacks she searches? Does the teacher need to have reasonable cause and individualized suspicion if the students consented to the search? What would justify a general search, if anything? Does the threat of suspension impair the students' ability to knowingly and to voluntarily consent to the search?

5. Learning Objective: Participants will understand the substantive due process and Title IX rights students enjoy with respect to sex discrimination, both in teacher-to-student situations and student-to-student situations.

- Lesson Plan: To meet this objective, the subject matter is best conveyed by a review of substantive due process, in particular the liberty right to be free from state-occasioned damage to bodily integrity, by the introduction to Title IX of the Education Amendment of 1972, 20 U.S.C. Section 1681, that prohibits discrimination on the basis of sex by any educational institution receiving federal funds and by a review of the regulations promulgated by the Office of Civil Rights, which implements and administers Title IX. The discussion then should proceed to two situations to which Title IX is applicable: teacher-to-student sexual harassment and student-to-student sexual harassment.
- Linkage/Extension: Liability and Immunity (Block Four)
- Rationale: This objective enables participants to assist their proteges to have an heightened awareness of the serious nature of sex discrimination, particularly the sexual harassment component of sex discrimination, and to help their proteges locate, understand, and apply school district policies and procedures when such matters are reported to them.
- Scenario: A, well known as a schoolyard bully, taunts B, a shy girl, with sexual verbal assaults and even grabs her in a sexual manner. A also sexually taunts and grabs C, a boy who frequently is the target of teasing because he is obese. The teacher who regularly supervises the students at play when the taunting and grabbing takes place, takes steps to modify A's behavior with regard to his conduct toward B, but takes no action with regard to A's conduct toward C, saying "boys will be boys." Is student-to-student harassment a violation of Title IX? Substantive due process? Is the student acting on behalf of the state? Does state action attach when school personnel knowing of the harassment fail to take action to stop it? Is it significant that the harassment of B, a girl, is treated differently than the harassment of C, a boy?

BLOCK THREE: Student Discipline

1. Learning Objective: Participants will understand the philosophy of rule making, particularly as related to substantive due process.

- Lesson Plan: To meet this objective, the subject matter is best conveyed with a discussion, including examples, of the procedural due process concepts of notice and hearing, together with the suspect concepts of irrationality, vagueness, being overbroad, and irrefutable presumptions.
- Linkage/Extension: Student Rights (Block Two); Liability and Immunity (Block Four)
- Rationale: This objective will enable participants to assist their proteges to be fair to students when making classroom rules, to understand the "why" underlying statutory and campus or district level rules, and to contribute meaningful insights to the campus level decision making.

- Scenario: A school district's dress code prohibits the wearing of baggy pants. Is the term "baggy pants" specific enough to give students and parents notice of the prohibited garment? Is there a reason to prohibit baggy pants? What is it? Does the rule cast too broad a net so as to prohibit acceptable garments? What if a student is disciplined for wearing baggy pants and the student claims the pants are protected nonverbal speech expressing pride in the student's ethnicity? (See Block Two.) Does the rule create an irrefutable presumption by prohibiting the wearing of a type of garment without specifying exceptions?

2. Learning Objective: Participants will understand the structure of the Texas student discipline system as provided in the Texas Education Code, Tex. Educ. Code Sections 37.001 *et seq.*, (Texas School Law Bulletin, 1998).

- Lesson Plan: To meet this objective, the subject matter is best conveyed by discussion and slides that diagram the hierarchy of offenses and their corresponding sanctions, together with the procedural due process required before administering the sanctions.
- Linkage/Extension: Student Rights (Block Two); Liability and Immunity (Block Four)
- Rationale: This objective will enable participants to assist their proteges to distinguish between mandatory and discretionary disciplinary sanctions and to discern from the multi-level collection of student disciplinary rules, the progressive nature of the relationship between prohibited student conduct and the corresponding sanctions. The progressive nature of the relationship between sanctions and the degree of procedural due process to which students are entitled will be explored.
- Scenario: At the classroom pencil sharpener, a student rudely cuts in line, conduct not prohibited by the district's Student Code of Conduct (SCC). A teacher is offended by the conduct and removes the student from the classroom. The principal is also offended by the conduct and removes the student to the school district's alternative education program (AEP) for 30 days. Can a student be sanctioned for conduct not prohibited by the SCC? Why? Assume the student's conduct is prohibited by the SCC, what procedural due process is the teacher required to follow before removing the student from the classroom? The principal?

3. Learning Objective: Participants will understand the relationship between the school discipline system and state juvenile justice system, Tex Fam Code Sections 51.03 *et seq.*

- Lesson Plan: To meet this objective, the subject matter is best conveyed by a discussion of Juvenile Justice Alternative Education Programs (JJAEP), which are required to be established by counties having more than 125,000 population, and which is part of the state's juvenile justice system, followed by a discussion of the conduct for which students must or may be referred to a JJAEP.
- Linkage/Extension: None
- Rationale: This objective will enable participants to assist their proteges to understand distinctions as well as the links between the two systems, for the purpose of understanding the respective roles of the protégé and law enforcement officials.

- Scenario: A student is expelled by the principal for possessing a knife that, because of its size is not only prohibited by the SCC, but the SCC requires expulsion as the sanction for the conduct and a mandatory referral to the JJAEP for the remainder of the semester. What due process is required before the principal can impose the sanction? Assume the student's parent(s) appeal the principal's decision to the superintendent complaining only about the referral to the JJAEP, can the superintendent change the referral to the JJAEP? Can the superintendent change the length of the expulsion and corresponding time the student must remain in the JJAEP? Assume the parent(s) appeals the principal's decision to the superintendent claiming that the student did not possess the knife, or that the knife was a smaller size, not warranting expulsion and a mandatory referral to the JJAEP, can the superintendent change the principal's determination regarding possession or size?

BLOCK FOUR: Liability and Immunity

1. Learning Objective: Participants will reinforce their understanding of the distinctions between criminal and civil liability.

- Lesson Plan: To meet this objective, the subject matter is best conveyed by beginning with a review of the systems as presented in Block One.
- Linkage/Extension: All topics
- Rationale: This objective will enable participants to assist their proteges to understand the type of jeopardy that will result if the protégé engages in certain conduct.
- Scenario: Assume the same paddling scenario as in the first learning objective of Block One.

2. Learning Objective: Participants will understand the components of negligence.

- Lesson Plan: To meet this objective, discussion and a slide diagram of the concept of negligence best convey the subject matter.
- Linkage/Extension: All topics
- Rationale: This objective will enable participants to assist their proteges to understand the importance of recognizing their duties so as to avoid breaching those duties.
- Scenario: A school nurse knows that a student suffers from asthma. District policy requires that all physicians prescribed medications, including inhalers, be kept in the nurse's office. The nurse hears the student approaching the nurse's office because of his wheezing, but does nothing but wait for the student to arrive at the office. The student never makes it to the office. The nurse does not check to see why the student has not arrived. In the meantime, another student sees the asthmatic student collapse on the hall floor and yells for help. The student sustains permanent injury despite being transported to the hospital. Did the nurse have a duty to intercept the approaching student with the inhaler left in the nurse's custody? When the student fails to arrive at the office, does the nurse have a duty to check to see what happened? Did the nurse breach any duty? Did the nurse's breach of duty cause damage to the student?

3. Learning Objective: Participants will understand the concept of immunity as the commission of wrongdoing in a safe zone.

- Lesson Plan: To meet this objective, the subject matter is best conveyed by a discussion that introduces the concept of immunity.
- Linkage/Extension: All topics
- Rationale: This objective will enable participants to assist their proteges to understand that immunity is not a blank check and that wrongdoing is not undone even if the protégé is cloaked with immunity.
- Scenario: Assume the scenario under the preceding learning objective. If the nurse was immune from civil liability, does this immunity make what the nurse did or failed to do right?

4. Learning Objective: Participants will understand the distinction between individual immunity and governmental immunity, both in the state and federal systems, and the concept of vicarious liability.

- Lesson Plan: To meet this objective, the subject matter is best conveyed by exploring the sources and, in general, the provisions of laws that grant immunity to either school districts or individuals such as the Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Section 101.001 *et seq.*, (Texas School Law Bulletin, 1998) with respect to school districts; the Texas Education Code, Tex. Educ. Code. Sections 22.051 *et seq.*, (Texas School Law Bulletin, 1998) with regard to individuals employed by school districts; the doctrine of qualified immunity with regard to the defense of individuals who have been sued in the federal system under Section 1983, 42 U.S.C.A. Section 1983; court cases that address the vicarious liability of school districts for the wrongdoing of its employees, *Faragher v. City of Boca Raton*, No. 97-282 (U.S. Sup. Ct. June 26, 1998); *Burlington Industries, Inc. V. Ellerth*, No. 97-569 (U.S. Sup. Ct. June 26, 1998); *Gebser v. Lago Vista Independent School District*, 118 S.Ct. 595 (1998).
- Linkage/Extension: All topics
- Rationale: This objective will enable participants to assist their proteges to understand that under some circumstances the protégé can be liable as an individual without necessarily making the district liable as a governmental entity, but that failure to report wrongdoing by others could cause the district to be liable also.
- Scenario: A high school coach has a sexual affair with a 14-year-old female student. The student's mother discovers the affair when she finds a crumpled note from the coach in her daughter's bureau drawer. The student denies the affair. The mother reports the affair to the coach's principal, who disregards the allegation and brushes off the parent. The parent then reports the matter to the superintendent, who has been on the job for only two weeks. The superintendent suspends the coach with pay pending a district investigation. The investigation supports the conclusion that the allegation by the parent was correct. The student_recants her denial. The district has no policy prohibiting sexual harassment and has no policy outlining procedures for employees to follow when such conduct is reported to them. Did the coach violate the student's substantive due process right to be free of damage to her bodily integrity? Is the coach liable under Section 1983? Did the principal show deliberate indifference to the allegation? Is the principal liable in one's supervisory capacity? Is the superintendent liable? Is the school district liable?

BLOCK FIVE: Students with Special Needs

1. Learning Objective: Participants will understand the sources and distinctions between Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794 (Section 504) and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Sections 1400 *et seq.*

- Lesson Plan: To meet this objective, the subject matter is best conveyed by beginning the discussion with the way these federal statutes can constitutionally impact state school districts, followed by a side by side slide presentation contrasting the similarities and distinctions between the two statutes.
- Linkage/Extension: Student Rights (Block Two); Student Discipline (Block Three)
- Rationale: This objective will enable participants to guide their proteges through the maze of these federal statutes and the regulations promulgated by the regulatory agencies.
- Scenario: A student has a history of disruptive behavior to the extent that neither he nor the other students in his classes are able to learn. At the parents' request, the school tests him. The testing results indicate that he does not meet the criteria to be identified as eligible for IDEA services. What can his teachers and counselors do to assist this student?

2. Learning Objective: Participants will be acquainted with the special needs terminology, definitions, acronyms, and underlying concepts.

- Lesson Plan: To meet this objective, the subject matter is best conveyed by a slide presentation of terminology and acronyms.
- Linkage/Extension: None
- Rationale: This objective will enable participants to assist their proteges to communicate with other educators in special needs language.
- Scenario: A first-year math teacher is approached by a more experienced teacher about a student. The experienced teacher states that this student is in Special Education. Thus, an ARD is needed to conduct a manifestation hearing, as well as a look at the BIP, and an evaluation of the LRE placement; but, in the meantime the student has to remain in his present class under the "stay put" rule. Is it likely that the first-year teacher will have a clue as to what the experienced teacher is talking about?

3. Learning Objective: Participants will understand that students identified as disabled under IDEA or impaired under Section 504 cannot be disciplined under state statutes, and district policies and rules if the misconduct is a manifestation of the student's handicapping condition or impairment.

- Lesson Plan: To meet this objective, the subject matter is best conveyed by a discussion that covers the concept and describes how school officials determine whether misconduct is or is not a manifestation of the student's handicapping condition or impairment.
- Linkage/Extension: Student Discipline (Block Three); Liability and Immunity (Block Four)

- Rationale: This objective will enable participants to alert their proteges to their duty to comply with these laws and to avoid pitfalls.
- Scenario: A student has been identified as emotionally disturbed, thus disabled under IDEA. In a rage, the emotionally disturbed student pulls a knife on another student. An ARD meeting is convened to conduct a manifestation hearing to determine whether the misconduct was a manifestation of the emotionally disturbed student's handicapping condition. The ARD committee determines that the misconduct was a manifestation of the handicapping condition, and the student went undisciplined. What criteria should the ARD committee use in making the manifestation determination? May the student be assigned to an alternative setting pending the manifestation determination?

Summary

Mentor-teachers need a general knowledge of education law to counsel and guide first-year teachers when legal issues arise. This paper outlines a professional development program covering relevant legal issues that can impact both teachers and students. This education can take the form of either a fifteen-hour workshop or one SCH college/university course. This workshop/course not only prepares mentor-teachers in assisting beginning teachers, but sets up an opportunity for mentor-teachers to pursue professional and personal lifelong learning to better prepare themselves for the demands of a changing world (Cross, 1995). And, in turn, the mentor-teachers' desire for continuing learning can encourage beginning teachers to undertake their own lifelong learning goals in the teaching profession, especially in preparation for the 21st Century.

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Preventive Law: An Essential Ingredient for Teacher Education Programs

Session B 4

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Preventive Law: An Essential Ingredient for Teacher Education Programs

Every semester those of us who teach public school law courses in Texas hear similar laments from our graduate students regarding not having learned this material during their teacher preparation work. For example, students have stated on course evaluations the following:

> • "These law cases are terribly important. I'm amazed that a teacher has to get to the graduate level to take it (law)."
>
> • "All of this (course content) is so important. I really believe under grads need some law before they begin (teaching)."
>
> • "I wish I had this class during my undergraduate course work! I appreciate the knowledge."

Students are often quite disturbed that they have not previously learned of restrictions on their constitutional rights and rights of privacy, as well as state statutes affecting contracts, due process, legal liability, and parental rights. They are disturbed to discover that they have mishandled situations, misguided others, or have themselves been mislead.

The quotes above merely reflect a level of frustration and concern among teachers, but obviously give no specific, quantified accounting of the grievances or litigation that have arisen due to teachers' lack of school law knowledge. In an attempt to quantify the effect of teachers' lack of knowledge of school law, several entities were contacted-- the Texas Bar Association and several Texas firms specializing in school law--and not surprising, none compile such records. We are confident, however, that the impetus for a substantial number of legal issues involving schools and school personnel is teachers' ignorance of the law as opposed to knowingly and recklessly acting against it.

Based on the presenters' experiences in Texas, it is our position that a course in public school law should be required in both teacher and administrator preparation programs in Texas. Having stated this position, the more encompassing question arises-- "What, if anything, do other states require regarding training in school law within their teacher preparation programs?" If training is deemed inadequate, should the Education Law Association consider advocating for a more comprehensive, consistent offering of school law within all teacher preparation programs?

To determine the requirements regarding school law training in teacher preparation programs in all 50 states, certification officers were contacted either by phone or e-mail and asked four questions.

1. What teacher certification requirements exist at the state level concerning public school law?

2. How are these requirements monitored or measured?

3. Has your state any plans to add/modify these requirements?

4. Could you send or fax your standards, requirements, etc.?

In assessing state requirements for teacher certification programs regarding knowledge, understanding, and application of public school law, a continuum of requirements emerged. The range varied from no requirement to that of passing approved state examination(s) in school law, as well as the state and federal constitutions.

At the time of this writing, 20 states have been surveyed.* Specific findings are provided below.

(I) Eleven states (55%) have **no standards** addressing public school law:

Missouri **Montana** **Nebraska** **New Hampshire**
New Mexico **North Dakota** **Ohio** **Pennsylvania**
Rhode Island **South Carolina** **West Virginia**

Two of these states-- **Missouri** and **Pennsylvania--** are in the process of revising their standards to include public school law. The new standards have not been approved by their state Boards of Education and therefore are not available for exact reference at this time. The responsibility of teaching these concepts to teachers is through the undergraduate programs at some time during their education. No specific mention of a class or how much time is to be allotted to these important concepts is mentioned. The standards, which should be in effect by 2000, will require teachers to have knowledge of laws to address student needs, parental rights, and teacher responsibility.

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* A complete accounting of all fifty states will be available at the session: B4

(II) Five states (25 %) require some general knowledge of public school law

A. The last of the 13 competencies tested in the **Oklahoma** Professional Teaching Examination is, "The teacher applies knowledge of teachers' legal rights and responsibilities (e.g. with regard to student discipline, situations involving suspected child abuse, the expression of political views); understands laws related to students' rights (e.g. assuring equal access to education, providing an appropriate education for students with special needs, maintaining confidentiality, ensuring due process); and applies knowledge of the rights and responsibilities of parents/guardians in various situations (e.g. in relation to student records, school attendance)."

B. All applicants for certification/licensure in **Oregon** must demonstrate knowledge of Title VI of the Civil rights Act of 1964, Title IX of the Education Amendments of 1972, and state and federal statutes prohibiting discrimination. Verification of satisfactory completion of state-approved workshops or courses offered by approved organizations is required.

C. **South Dakota** currently requires professional education programs to offer instruction on (1) the legal and ethical considerations of school personnel, including the rights and responsibilities of students, parents, teachers, administrators, and other professional staff members; (2) national, state, and local laws, policies, and procedures affecting students with learning disabilities; and (3) the political process as it applies to education.

D. **Vermont** preparation programs are required to document that their students have demonstrated competency regarding the ability to (1) integrate special education students into appropriate learning situations; (2) identify conditions and actions which would tend to discriminate against students on the basis of sex, race, color, creed, age, sexual orientation, disability, or national origin; and (3) understand laws related to student and educator rights and responsibilities; and (4) treats students and colleagues fairly and equitably.

E. Within the 18 semester hour professional development sequence, **Texas** students are required to study (1) the characteristics; assessment; least restrictive alternatives; and admission, review, and dismissal processes for students requiring individualized or specialized education programs; (2) legal and ethical aspects of teaching, to include the recognition of and response to signs of abuse and neglect in children; and (3) the structure, organization, and management of the American school system, with emphasis on the state and local structure in Texas.

All of these states require that these concepts be taught at some point in the initial preparation of teachers. There is no specific reference to a distinct class or to how much time must be devoted to these concepts. Once a teacher has been certified, there is no procedure to require periodic updates.

(III) Four states (20 %) require a specific public school law or passage of a state approved examination.

A. **Nevada** requires all applicants to submit verification of completion of course work or pass the state-approved examination(s) in Nevada School Law, Nevada Constitution, and the U.S. Constitution.

B. **Utah** requires a specific three semester credit hour course on school law. Standard X requires the study of federal and state laws and State Board of Education policies which specify content, values, ethics, and other expectations relating to the responsibilities of professional educators.

C. **Virginia** requires a three semester credit hour course in the foundations of education which addresses the legal status of teachers and students, including federal and state laws and regulation.

D. **Wyoming** Board of Education rule requires an applicant to document the completion of a course which provided instruction on the U.S. Constitution and the Wyoming Constitution or pass a state exam. In addition, there are standards requiring preparation programs to offer instruction on the legal and ethical considerations of school personnel, to include the rights and responsibilities of students, parents, teachers, administrators, and other professional staff. Political processes as they apply to education must be taught , as well as issues regarding child abuse.

School District Liability For Teacher-On-Student Sexual Harassment Under Title IX: "Actual Knowledge" By An "Appropriate Person" And "Deliberate Indifference"

Alexa R. Ross

In recent years, sexual harassment lawsuits have been the focus not only of media attention, but also of the federal docket. The Supreme Court in the 1997-1998 term heard a record number of cases (four) raising important issues about sexual harassment law. All four of the cases deal with standards for imposing liability for harassment, three in the employment setting and one in the school setting.

In the employment setting cases, the Court clarified the definition of "sexual harassment" and applied agency principles to the issue of employer liability. In Oncale v. Sundowner Offshore Services Inc., 118 S.Ct. 998 (1998), the Court unanimously ruled that same-sex sexual harassment claims are cognizable under Title VII. In Bloomington Industries Inc. v. Ellerth, 118 S.Ct. 2257 (1998) and Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998) the Court examined the standards for imposing liability on employers when harassment is carried out by a supervisor rather than a co-worker. The Court held in Ellerth that an employer can be held vicariously liable for harassment that consists of a supervisor's unfulfilled threats, but that the employer can avoid liability by satisfying a two-part affirmative defense regardless of whether the harassment is assessed as being quid pro quo or hostile environment. In Faragher, the Court applied the Ellerth rules to a hostile environment claim in which plaintiff admittedly never complained to higher management when her supervisors harassed her. The Court held that the employer had not exercised reasonable care to prevent the harassment.

In the school setting case, the Court set forth a narrow set of circumstances under which a school district can be liable for teacher-on-student sexual harassment. In Gebser v. Lago Vista Independent School District, 118 S.Ct. 1989 (1998) the Court imposed a stringent test that a plaintiff must meet to recover damages under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et. seq., against a school system for the sexual misconduct of a teacher.[1] The Court specified two prongs essential to a Title IX claim against a school system for teacher-on-student sexual harassment. First, plaintiff must show that the school system had "actual knowledge" of the harassment; "constructive knowledge" will not suffice. In order to show "actual knowledge," an "appropriate person" employed by the school system must have been aware of the sexual harassment. An "appropriate person" is "an official of the recipient entity with authority to take corrective action to end the discrimination." Second, plaintiff must show that the school system reacted with "deliberate indifference" when faced with actual knowledge of the harassment, i.e., that the school system took no appropriate action. (The stringent Gebser test became the Court's ruling in a five-to-four decision.)

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[1] On September 29, 1998, the Supreme Court accepted certiorari in Davis v. Monroe County Board of Education, 120 F.3d 130 (11th Cir. 1997). At issue in Davis is whether a school district can be liable under Title IX for student-to-student sexual harassment.

Notably, the Court in Gebser imposed a standard for damages liability under Title IX different from the standards it applied to employer liability under Title VII for sexual harassment in the work place. In Ellerth the Court held that vicarious liability may be imposed on the employer under Title VII for sexually harassing conduct by a supervisor if the supervisor "was aided in accomplishing the tort by the existence of the agency relation." For example, the employer may be liable when a supervisor imposes a tangible job detriment against a subordinate employee. On the more difficult question -- whether the "aided by the agency relation" standard applies to supervisor harassment that does not involve tangible job detriment -- the Court set forth rules to "accommodate the agency principles of vicarious harm caused by misuse of supervisory authority" with "Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees":

- "An employer is subject to vicarious liability. . .for an actionable harassment created by a supervisor with immediate. . .authority over the employee."
- "Where no tangible employment action is taken, the employer may

> raise an affirmative defense" to preclude vicarious liability. The affirmative defense must consist of two elements: (1) "[T]hat the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior." (2) "[T]hat the plaintiff employee unreasonably failed to take advantage of any corrective opportunities provided by the employer or to avoid harm otherwise."

Ellerth 118 S.Ct. at 2267-69.

In Faragher the Court applied Ellerth and thus applied the agency analysis. The Court declined to hold the employer liable to bear the risk of the foreseeability of workplace harassment by a supervisor and reasoned that an employer should not face automatic liability. However, under the affirmative defense articulated in Ellerth, the Court concluded that the City of Boca Raton faced vicarious liability for failure to disseminate its policy against sexual harassment and because the policy did not provide assurance that the complainants could bypass their supervisor when invoking the complaint procedure. Therefore, the City had not exercised reasonable care to prevent the supervisor's harassing conduct. Faragher 118 S.Ct. at 2290-91.

The Court in Gebser refused to apply Tittle VII standards to Title IX claims. The Court emphasized that Title VII's goal was to "compensate victims of discrimination," while Title IX aims to "protect individuals from discriminatory practices carried out by recipients of federal funds." A standard for a school district liability lesser than the Gebser two-pronged test, the Court reasoned, would "frustrate the process" of Title IX. Actual notice and deliberate indifference, according to the Court, are necessary elements of Title IX liability because these elements would constitute discriminatory practices by the actual recipient of the federal funds - the school system. Gebser, 118 S.Ct. at 1995.

Gebser states a standard for imposing Title IX liability different from the standards applied by the Circuit Courts of Appeal pre-Gebser. The Circuit Courts of Appeal had used three analytical models for determining whether a school district should be held legally responsible for the sexual harassment of a student by a teacher: (1) Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d Ed. Sec. (2) Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e Ed. Sec. (3) Restatement (Second) of Agency 1 § 219.

Under the Title VI analogy standard, a plaintiff had to prove that a recipient of federal funds (the school district) acted with discriminatory intent. Guardians Ass'n v. Civil Serv. Comm'n of City of New York, 463 U.S. 582 (1983). Courts applying the Title VI standard held that a school district could not be held liable if it did not in some way actually participate in the discriminatory conduct. See, e.g., Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 468 (5th Cir. 1997); R.L.R. v. Prague Pub. Sch. Dist., 838 F. Supp. 1526 (W.D. Ok. 1993). Under the Title VII standard, plaintiff could prevail on a hostile environment sexual harassment claim by showing that the school district "knew or should have known" of the hostile environment and failed to correct it. "Knew or should have known" encompasses both actual and constructive notice. The Courts interpreted this standard as requiring that someone in a school district management-level position was put on notice of the harassing conduct and failed to take action. Cantuillo Indep. Sch. Dist. v. Leija, 101 F.3d 393 (5th Cir. 1996). See also Doe 1 v. Covington County Sch. Bd. of Educ., 930 F. Supp. 554 (M.D. Al. 1996). Under the agency model of institutional liability, plaintiff had to prove that the school district had been negligent or reckless in failing to prevent the teacher's harassment. Rosa H., 106 F.3d at 654 (rejecting agency standard).

Applying Gebser to fact patterns in specific cases promises to be challenging. For example, what is the appropriate result for each of the following under Gebser?

- For four years, a third-grade teacher and Boy Scout troop leader sexually molests numerous male students. The teacher is convicted in state court of one count of aggravated sexual assault and two counts of indecency with a child. The teacher is sentenced to one life sentence and two twenty-year sentences. Several of the molested students later filed a state court action, which is removed to federal district court. Defendants in the suit include the school district.

  The district court dismisses the Title IX claim against the school district because it is based on same-sex sexual harassment. Subsequently, the Supreme Court hands down its decision in Oncale.

On appeal, should the Title IX claim survive?

- Students file an action against the state Board of Regents, alleging that while they were students in a state university they were subjected to acts of sexual harassment committed by a fellow student who acted in his capacity as a higher-ranking ROTC cadet. Plaintiffs allege that they reported the harassment to a superior ROTC officer, and that he retaliated against them by denying them ROTC opportunities and subjecting them to other acts of sexual harassment. Plaintiffs allege that they reported the harassment to university representatives and that the university did not respond to the allegations.

  The United States District Court grants the Board of Regents' motion to dismiss the Title IX claim. On appeal, should the Title IX claim survive?

- Minor students sue the school district, among others, under Title IX for claims rising out of incidents in which a school security guard allegedly assaulted several students and raped one student. The security guard allegedly forced one fourteen-year-old student into his car and took her to an abandoned house, but the security guard acquiesced when the student refused to comply with his request that she remove her clothes. One week later the security guard raped that student's sister. One month later the security guard was fired from his job based on the charges made against him by plaintiffs. He then was criminally charged and entered a guilty but mentally ill plea. The security guard eventually served three years of a ten-year prison sentence for false imprisonment and sexual assault. Neither the board of education superintendent nor the school board members were aware of the security guard's conduct before the incidents at issue in the lawsuit.

The United States District Court grants summary judgment for defendants. On appeal, what is the correct result under Title IX regarding school district liability?

A student sues a state institute of technology under Title IX for sexual harassment allegedly perpetrated by male professors and students and allegedly ignored by the institution. Plaintiff alleges that four professors and six students sexually harassed her on twelve occasions within one and one-half years. The incidents of alleged teacher harassment involved "ogling" and "unwanted touching" of plaintiff's arm and back. The alleged incidents of harassment by students involved unwanted touching of plaintiff's hand, shoulder, back, and leg; two incidents of unwanted touching of plaintiff's breast, and one incident of a kiss on the cheek. Plaintiff alleges that she reported two of the twelve incidents to school officials (a touch on the shoulder by a fellow student reported to plaintiff's teacher, and a touch on the breast by another student reported to a professor who also is the director of the masters degree program in which plaintiff is enrolled.)

The state defendants move to dismiss the Title IX claim. Should the claim be dismissed by the district court?

A former student sues a college alleging that her relationship with a professor constituted sexual harassment and that the college should be held liable for the professor's conduct. Plaintiff alleges both quid pro quo and a hostile environment harassment in violation of Title IX. Factually, plaintiff alleges that during the spring quarter of her sophomore year, she enrolled in a philosophy course and that the professor persuaded her and other students to attend a seminar held in a rustic and isolated location. The professor allegedly provided the students with alcohol. The sexual harassment allegedly began at this location and consisted of comments, innuendos, the singing of sexually suggestive songs, and touching. Eventually, the relationship became sexual and remained so for over one year. Defendant college had a sexual harassment policy pursuant to which a student who believes she is being harassed should report the matter to the college grievance officer. Plaintiff did not do so until graduation. She claimed to have waited until graduation to bring the complaint because she feared both the scandal and academic repercussions. Plaintiff claims the grievance officer was not supportive and did not take her grievance seriously.

Defendant college moves for summary judgment. Should the district court grant summary judgment for the college under Title IX?

Sexual Violence and Sexual Harassment in K-12 Schools
A review of the surveys and crime data

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Summary and Recommendations

This review has produced a moderately substantiated picture of sexual violence and sexual harassment in schools. In the process, many recommendations have surfaced that might reduce both sexual harassment and sexual violence in schools, create new public policy, foster collaboration between agencies and schools, and offer new directions for research. The following recommendations are divided into those that are school-based, policy-based, and research-based.

School-based recommendations

1. **Heighten awareness of all school staff** (teachers, administrators, cafeteria workers, custodians, bus drivers, coaches, secretaries, etc.) about sexual harassment and sexual violence, including dating violence, in schools. Establish mandatory professional development training on the subject that is more than an hour lecture on an early-release day when the staff are herded into the auditorium or cafeteria to listen to a speaker from an outside organization or worse yet, the school's attorney. Instead, half-day interactive training sessions should be required of all school personnel, with additional training offered to specialized teams, made up of both men and women within each school building. These teams would then serve as "Ombuds" (a title that, although it is difficult to pronounce, is preferable to either "complaint manager" or "grievance coordinator," which are terms guaranteed to turn off the students) to whom students wishing to make complaints would be directed. These teachers/ teachers/Ombuds would also be asked to include discussions of sexual harassment and sexual violence in their classrooms as part of the regular school curriculum.

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2. **Foster collaboration between K-12 schools and domestic violence and/or sexual assault organizations**. As a start, invite representatives from those organizations to collaborate with teachers and other school staff to make multi-session presentations to students, beginning in the elementary grades.
3. **Redesign and re-administer sexual harassment surveys**. Future surveys on sexual harassment should include questions that ask about the relationship between the harasser/perpetrator and the target. While some sexual harassment is conducted in an anonymous fashion (graffiti, notes, cat-calls, and the like), much of it occurs in public between people who know each other. These relationships should be probed for manifestations of dating violence.
4. **Create a school-based version of a temporary restraining order**. This process could be simple, non-contestable by the other party, and enforced by school personnel, with reprisals for violations. Since it is not at all certain how many adolescents would avail themselves of civil orders of protection/temporary restraining orders (discussed below), by creating and offering a school-based version, the process would be simplified and demystified for them. In addition, parental permission might be required, along with oversight from school personnel (all of whom would first have to be informed).

Policy and Research-based Recommendations:

1. **Expand eligibility for temporary restraining orders (TRO's; also known as "orders of protection") to include non-cohabitating minors**. These statutes are "more than practical tools to combat relationship violence. The recognition of

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adolescent relationship violence would reinforce adolescents' awareness of domestic violence issues and of the availability of assistance" (Levesque, 1997). Unfortunately, the great majority of adolescents in abusive relationships cannot get protections because they are merely dating (as opposed to being married or living together), do not meet age requirements, or do not meet some other residency requirement (Levesque, 1997). Currently, only 13 states allow for these protections for minors (with distinctions in some States made between dating, courtship, and engagement): Alabama, Alaska, California, Colorado, Illinois, Massachusetts, Minnesota, New Hampshire, New Mexico, North Dakota, Oklahoma, Pennsylvania, and West Virginia. These 13 States allow for the most protections offered to adolescents because they do not impose conditions or restrictions, such as parenthood, marriage, cohabitation, or other adult requirements (Levesque, 1997). However, nine of the 13 states require the adolescent to be 18-years-old while three States require the adolescent to be 16-years-old. In Massachusetts, for example, in 1996, 900 TRO's were issued to minors between the ages of 13 AND 17 (Quiroga, November 5, 1997). In addition, another 14 States permit minors who are co-parents to be eligible for TRO's. Those 14 States are: Arizona; Connecticut; Florida; Georgia; Idaho; Kentucky; Maine; Nebraska; Nevada, North Carolina, South Carolina, South Dakota, Virginia, and Wyoming. Unfortunately, only nine States allow minors to be the subject of civil actions (meaning that if one's batterer/abuser is a minor, then a TRO could not be issued against that person). The nine States THAT permit minors to be the subject of a TRO are: Alaska, Idaho, Illinois, Massachusetts, Connecticut, Oklahoma, Utah, Washington, and

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Wyoming. Eight States expressly prohibit minors from being subject to TRO's: Arizona, Colorado, Iowa, Missouri, New Jersey, Oregon, Tennessee, and Wisconsin. Sadly, such restrictions imply that violence and abuse from a minor is somehow less or different than violence and abuse from someone who is no longer a minor. To quote from Levesque (1997) again:

> The failure to incorporate adolescents into domestic violence policies engenders a brutal social reality: adolescents are left without legal recourse and without mandated or otherwise available services. In essence, therefore, adolescent battering remains invisible.

Adolescents will remain in a peril until all States offer them eligibility for protection from (sexual) violence from a dating or courting partner.

2. **Permit domestic violence/sexual assault organizations to apply for funding under various government programs that would enhance their collaboration with and entry into schools**. An obvious fit would be the grants offered by the Safe and Drug-free Schools program of the U.S. Department of Education. No doubt there are others within the Department of Education and other agencies.
3. Create a **single definition of sexual violence** for use by all governmental agencies.
4. **Add gender-based and gender-motivated crimes** to the National and State definitions of Hate Crimes (such a provision has been introduced into Congress; and in some states, as Massachusetts, these provisions are already law).

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APPENDIX A: Summary of Sexual Harassment Surveys

Survey	Date	Type	Sample	Results	Conclusion
Seventeen survey	March, 1993	Magazine, non-probability	2,002 9-19 year old girls	89% experienced sexual comments, gestures, or looks 83% experienced being touched, pinched or grabbed	informed speculation
AAUW/Harris Poll	June, 1993	probability, sample (79 public schools)	1632 students; 828 boys, 779 girls in 8th to 11th grades in 79 public schools	83% of girls and 60% of the boys experienced sexual harassment	well substantiated, 95% confidence level, with a margin of error at + or - 4%
USA Weekend Magazine	September, 1996	Magazine, non-probability	222,653 students; 97,967 boys, 124,686 girls, in grades 6 to 12,	81% of girls and 76% of boys experienced sexual harassment	informed speculation
Connecticut survey	January, 1995	probability, sample	547 public school students; 308 girls, 235 boys, (numbers do not add up to total, quoted from In Our Own Backyard, p. 8) grades 10 to 12	92% of girls and 57% of boys experienced sexual harassment	well substantiated
Massachusetts survey	1980-1981	non-probability	49 high school students	38 experienced sexual harassment	informed speculation
Iowa survey	1994	non-probability (83 schools)	503 high school students; 253 girls, 250 boys,	83% of girls and 62% of boys experienced sexual harassment	moderately substantiated
North Dakota survey	1997	non-probability (8 schools)	176 12th grade students; 87 boys, 89 girls	93.3% of girls and 83% of boys experienced sexual harassment	moderately substantiated
New Jersey survey (Trigg & Wittenstorm)	1996	non-probability (9 schools)	696 students; 365 girls, 331 boys	97% of girls and 70% of boys experienced sexual harassment	well substantiated

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APPENDIX A: Summary of Sexual Harassment Surveys (Continued)

Texas survey	October, 1997	non-probability, conducted at workshops	1860 students in grades 7 to 12: 784 girls, 886 boys	64% of girls and 25% of all students experienced unwanted touching, pinching, or grabbing, boys results not available	informed speculation
Fineran and Bennett study	1995	non-probability (1 school)	342 high schools students, 120 boys, 222 girls	87% of girls and 79% of boys experienced peer sexual harassment	moderately substantiated
Roscoe, Strouse and Goodwin study	1994	non-probability (1 school)	561 white students from 11 to 16 years old; 281 girls, 280 boys	50% of girls and 37% of boys experienced peer sexual harassment	moderately substantiated
New Jersey study	1995	non-probability 1 school	711 high school students in one school; 327 girls, 384 boys	73% of all students experienced sexual harassment, gender breakdown not available	moderately substantiated
Shakeshaft ongoing study	1992-1995	Naturalistic observations, interviews in school	1000 middle school students in 8 schools, gender not available	no statistics available	informed speculation
Russo study	1996	interviews and focus groups	26 physically disabled students, 15-22 years old in five after-school programs and one high school; 19 girls, 7 boys	no statistics available	informed speculation
Massachusetts Youth Risk Behavior Survey	1996	probability, sample	4159 students in grades 9-12; 183 (4.4%) identify as gay, lesbian, or bisexual	20.1% of gay, lesbian and bisexual students, compared to 4.5% of other students, skipped school in the past month because of feeling unsafe on route to or at school, 66.7% of gay, lesbian or bisexual students, compared to 28.8% of other students, were threatened or injured with a weapon at school in the past year	well substantiated

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Appendix B: Types and Prevalence of Sexual Harassment Reported in Three Well Substantiated Studies

	AAUW/Harris Poll: Hostile Hallways Survey (1993) (8th - 11th grade students)		Connecticut Survey: In Our Own Backyard (1995) (10th - 12th grade students)		New Jersey Survey* (Trigg and Wittenstrom) (1996)
	boys	girls	boys	girls	all respondents
Experienced sexual comments, jokes, gestures, or looks	56%	76%	26% (only includes comments)	67%	58%
Experienced suggestive sexual gestures or looks	included in category above		13%	53%	included in category above
Told offensive sexual jokes	included in category above		17%	40%	included in category above
Touched, grabbed, or pinched in a sexual way	42%	65%	32%	65%	51% (includes being brushed up against in a sexual way)
Intentionally brushed up against in a sexual way	36%	57%	NA	NA	included in category above
Flashed or mooned	41%	49%	NA	NA	37%
Had sexual rumors spread about them	34%	42%	18%	37%	35%
Had clothing pulled at in a sexual way	28%	38%	NA	NA	NA
Shown, given, or left sexual pictures, photographs, notes, or illustrations	34%	31%	9%	19%	NA
Had their way blocked in a sexual way	17%	38%	10%	47%	22%
Had sexual messages/graffiti written about them	18%	20%	9%	10%	NA
Forced to kiss someone	14%	23%	included in category below		14%
Forced to do something sexual other than kissing	9%	13%	3% (includes kissing)	14%	10%
Called gay or lesbian	23%	10%	NA	NA	NA
Had clothing pulled off or down	17%	16%	NA	NA	NA
Spied on while dressing/showering	8%	7%	NA	NA	NA

(NA = not asked in survey) * New Jersey Survey did not divide responses by gender

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APPENDIX C: Summary of Dating Violence/Sexual Violence Surveys That Mention School as a Location of the Sexual Violence

Survey	Date	Type	Sample	Results	Conclusion
Roscoe & Callahan	1985	11th and 12th graders surveyed in first period non-probability sample	204 high school students: 108 girls, 96 boys between 15 and 20 years old	Of the 17 students: 11 girls, 6 boys involved in dating violence, 35% experienced it at school	moderately substantiated
Roscoe & Kelsey	1986	in class survey (1 parochial school) non-probability sample	77 12th grade students: 45 boys, 32 girls, ages 16 to 19	Of the 23 students involved in dating violence, 27%experienced it at school	moderately substantiated
Bennett & Fineran	1998	surveys completed during required English class and study hall (2 high schools) non-probability sample	463 students; 190 boys, 273 girls, ages 14 to 20	22% of students experienced sexual violence, 15% experienced severe dating violence (sexual and physical violence combined)	moderately substantiated
Molidor & Tolman	1998	surveys completed in 23 single sex gym classes (1 high school) non-probability	635 students, ages 13-18: 330 boys, 301 girls	41% of boys and 35% of girls experienced some form of physical aggression from dating partner, 46% of these students experienced it at school	moderately substantiated
Jasinski & West	1997	(2 high schools) non-probability	143 teachers; 52 men, 91 women	0% of male teachers, compared to 7.5% of female teachers, thought that there was a serious dating violence problem in their school 21.3% of female teachers, compared to 13% of male teachers, thought dating violence was a moderately serious problem in their school	moderately substantiated

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LAGO VISTA: THE LAST WARNING

by Ann Clarke Snell[1]

At first glance, this summer's United States Supreme Court decision in *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S.Ct. 1989 (1998), gives school districts reason to celebrate. In *Lago Vista*, the Supreme Court held that a school district is liable for a teacher's sexual harassment of a student only if an official of the school district who has authority to institute corrective measures has *actual notice* of and is *deliberately indifferent* to the teacher's misconduct. *See* 118 S.Ct. at 1993. In theory, this is a difficult burden for plaintiffs to meet. In practice, however, future plaintiffs will know how to plead their cases. Many will find enough evidence of actual notice and deliberate indifference to allow them to withstand a school district's motion for summary judgment. Some may ultimately win their lawsuits. *Lago Vista*, therefore, should not make school districts complacent about sexual harassment. While school districts are still vulnerable to liability for sexual harassment, they are not powerless. Districts can take affirmative steps that will put them in an excellent position to defend sexual harassment lawsuits.

The *Lago Vista* decision

In *Lago Vista*, a high school teacher for the Lago Vista Independent School District had a sexual relationship with one of his freshman students. 118 S.Ct. at 1993. The relationship continued into the student's sophomore year, and often involved sex during class time. *Id.* The student did not report the relationship to school officials, who found out about it only after a police officer arrested the teacher upon discovering the two having sex. *Id.* The student sued the school district under, among other things, Title IX of the Education Amendments of 1972. *Id.* The district court granted summary judgment for the school district, and the Court of Appeals for the Fifth Circuit affirmed. *Id.* at 1993-94.

The Supreme Court upheld the lower courts' judgment, basing its holding on the intent behind the enactment of Title IX. *Id.* at 1999-2000. As stated above, the Court held that a school district is liable for damages in a sexual harassment case only if a school district official with authority to institute corrective measures has actual notice of and is deliberately indifferent to the harassment. *See id.* at 1993. In this case, the student did not show that the school district had actual notice of the harassment. *Id.* at 1999-2000. However, the Court specifically left open the potential for damages against a school district under state law. *Id.* at 2000. Furthermore, the Court appeared to encourage the Department of Education to enforce Title IX regulations administratively. *Id.* Administrative enforcement can result in loss of a school district's Title IX funds. 20 U.S.C. § 1682. The specter of lawsuits brought under state law, more artfully pleaded lawsuits brought under Title IX, and potential loss of federal funds should be enough to make school districts resolve to take preventive action.

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Potential affirmative defenses

In two cases decided contemporaneously with *Lago Vista*, the Supreme Court held that employers could establish an affirmative defense to liability in some Title VII cases. *See Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257, 2270 (1998); *Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2292-93 (1998). While this defense has not been applied to Title IX cases, the position of school districts in relation to sexual harassment lawsuits is similar in many ways to that of employers. Furthermore, given that students suing school districts for sexual harassment must meet a higher burden than employees suing employers, school districts that satisfy the requirements of this defense may place themselves in the best possible position to defend a lawsuit. School districts cannot take advantage of this type of defense unless they institute procedures designed to prevent sexual harassment from occurring by allowing a district to discover it early and take prompt corrective action.

Under Title VII, the defense articulated by the Supreme Court only applies when the employee did not suffer any "tangible job detriment," for example, termination or demotion. *See Ellerth*, 118 S.Ct. at 2270. To establish the defense, the employer must show 1) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and 2) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Id.*

Policy and grievance procedure

School districts should be primarily concerned with the first requirement: exercising reasonable care to prevent and correct sexual harassment. The first step in preventing and correcting sexual harassment is creating a written policy against sexual harassment accompanied by a grievance procedure for resolving complaints. While lack of such a policy does not deprive employers of the defense as a matter of law, it would make it very difficult for any but the smallest employers to show that they exercised reasonable care. *See Faragher*, 118 S.Ct. at 2293. Moreover, regulations under Title IX require school districts to have a written policy and grievance procedure. *See* 34 C.F.R. § 106.8(b) and 106.9(a) (1997). Therefore, a school lacking a sexual harassment policy risks losing its Title IX funding or receiving an adverse decision if a complaint is filed with the Office of Civil Rights of the Department of Education (OCR). *See* 20 U.S.C. § 1682. The OCR has published an excellent handbook on sexual harassment which gives detailed advice on policies and procedures schools should adopt. The pamphlet, "Sexual Harassment: It's Not Academic," is attached to this paper as an appendix. Keep in mind that this pamphlet was last updated in May of 1997 and therefore does not reflect this summer's Supreme Court decisions.

Content and dissemination

Written policies and procedures, however, are of little, if any, practical value unless they are disseminated to all employees, students, and parents. In *Faragher*, for example, the City of Boca Raton had a written policy, but failed to distribute it among the beach employees, where the harassment occurred. *See Faragher*, 118 S.Ct. at 2293. That, along with an inadequate grievance procedure, caused the Supreme Court to conclude that the City had not exercised reasonable care. *See id.* The City's grievance procedure was inadequate because it did not ensure that the harassing supervisors could be bypassed in registering complaints. *See id.* For this reason, a grievance procedure should not require a student to confront or attempt to work out the problem informally with the alleged harasser. Moreover, a district would be wise to designate at least two people to receive sexual harassment complaints. *See* OCR Sexual Harassment Guidance (suggesting that every school have two Title IX coordinators).

In its handbook, the OCR suggests that summaries of the policy and grievance procedure be included in school publications, and that complete versions be available at several locations on campus. An efficient way to disseminate a policy and grievance procedure to students and parents is to include them in the student handbook and mail the handbook to the students' homes before the school year begins. Schools could request that parents and students read the handbook, sign a form indicating they have done so, and send the form back to the school. The school would then retain these forms to show that students and parents were aware of the policies.

Training

Training is an invaluable opportunity for school districts to educate employees and students about their policies and grievance procedures. If feasible, training for employees and students should be held in small groups. When training teachers, counselors, and other employees, the district should stress their duty to report any instance of sexual harassment to the appropriate school official. To be liable under Title IX, a school official who has "authority to institute corrective measures" must have had actual notice of the harassment. *Lago Vista*, 118 S.Ct. at 1989. One never knows who a court might decide has authority to institute corrective measures. Although an administrator immediately comes to mind, this description might apply to a teacher or other employee, if that person had the power to set corrective measures into motion by making a report. In arguing that the harassing teacher's knowledge of his own conduct provided the district in *Lago Vista* with actual notice of the harassment, the dissent pointed out an interesting logical conundrum regarding authority. The dissent noted that the teacher in that case would presumably have had the authority to take corrective measures regarding students sexually harassing other students. *See Lago Vista*, 118 S.Ct. at 2003 n.8. Therefore, says the dissent, the teacher should be seen as having the authority—if not the will—to prevent his own harassing conduct. *See id.*

In training, a district must give attention to the concept of actual notice, which may consist of witnessing or hearing about any inappropriate behavior, however minor. Therefore, a district must instruct all of its employees to make a report any time they see or hear anything leading them reasonably to suspect that sexual harassment has occurred or is occurring. This applies to sexual harassment of students by anyone on campus, including other students and non-employees.

When training students, a district should emphasize that no employee of the district is allowed to retaliate against a student for reporting sexual harassment. The prohibition against retaliation should be affirmatively stated orally and in writing in every investigation of a report of sexual harassment. It is also important to give examples of sexually harassing behavior to both students and employees. Some may not realize, for example, that comments or jokes of a sexual nature may constitute harassment.

Investigation

Once a report has been made, an impartial investigation is crucial to the fair resolution of the complaint for both the alleged harasser and the complainant. First of all, schools should investigate all complaints, no matter how minor or questionable they may appear at first blush. Even if it is unlikely that harassment occurred, an investigation shows the school's good faith and is an excellent opportunity to further educate students and employees about the school's anti-harassment policy. In addition, it should go without saying that the person investigating the complaint should be neither the alleged harasser nor anyone closely identified with either the accused harasser or the complainant.

Further, thoroughly documenting the investigation is essential. Everyone's version of the events should be recorded while it is fresh, for accuracy as well as prevention of later recharacterization. Every effort should be made to preserve the privacy of all people involved, including any individuals interviewed, until the investigation is complete. When interviewing the alleged harasser, however, it may be necessary to reveal the identity of the complainant in order to give the alleged harasser a fair opportunity to respond to the complaint. There are occasions, however, when questioning brings out the name of the complainant without the investigator's initially revealing it. If the person who made the complaint is someone other than the alleged victim, the investigator should keep that person's identity confidential. The investigator should also tell the alleged harasser that if found to be true, the allegations would constitute sexual harassment. Further, the alleged harasser must neither contact nor retaliate against the complainant. The complainant should be told to report any instance of retaliation.

Once the investigation is complete, the investigator should communicate, generally in writing, the result to all those involved, including the complainant's parents. If the allegations are true, the school should take appropriate action against the harasser. Regardless of the result, the complainant should be informed to report any further instances of harassment or retaliation.

Of course, special care should be taken when investigating a sexual harassment report involving elementary age children. Finding the right person to investigate is very important. Some school districts use a law enforcement officer with experience investigating child abuse. Anyone who investigates these complaints should have specific training in interviewing young children.

Harassment of students by other students

Sexual harassment of students by other students, commonly called peer harassment, is more difficult for schools to control than harassment by employees. Federal courts disagree on whether school districts are liable under Title IX for peer sexual harassment, and the Supreme Court has granted review to decide the issue. *See Davis v. Monroe County Board of Education*, 120 F.3d 1390 (11th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3387 (1998). Until this issue is decided, schools should treat peer sexual harassment just as seriously as harassment by school employees. It should be included in the schools' policy and training, and the same anti-retaliation provisions and other rules should apply. Indeed, school districts should be concerned about harassment or abuse of students by other students regardless of whether failure to control, prevent, or punish such behavior will expose the district to risk of liability.

Conclusion

No one wants to believe that children are vulnerable to sexual harassment and abuse, especially at school. The natural reaction when we witness or hear about suspicious behavior in this context is to convince ourselves that it is insignificant and to resist becoming involved. We must learn to notice suspicious and improper sexual behavior and to report and investigate it, in order to avoid liability as well as protect our children and provide a secure learning environment. In addition, those who are prone to engage in such conduct need to be identified and worked with to try to mitigate or obviate such proclivities.

If a school creates and disseminates an adequate policy against sexual harassment and appropriate grievance procedures, if it takes opportunities to educate employees, students, and parents about these policies and procedures, and if it investigates complaints aggressively and impartially, it should be able show it exercised reasonable care to prevent and correct sexual harassment. These efforts should be documented and records maintained to demonstrate and prove that the policies are used to address problems when they occur and to train employees and students to recognize and report sexually offensive conduct. If a student unreasonably fails to use the school's procedures, the school may have a defense in a sexual harassment lawsuit brought by the student. If students and employees use the school's procedures and report harassment, the school can act quickly to limit any harm. In this way schools can, rather than wondering when the first lawsuit will come, take affirmative steps to both limit their liability and prevent sexual harassment from occurring on their campuses. At best, this is an opportunity to teach children and adults alike how to get along in our lively, diverse society.

Discipline and Behavior Under IDEA Reauthorization

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Reauthorization of IDEA includes a number of changes that impact daily practice in special education. Of particular significance is the language set forth regarding discipline and behavior for students with disabilities. Two points of interest related to discipline and disabilities are the application of functional behavioral assessment (1) and manifestation determination review (2).

Under reauthorization it is clearly stated that educators must provide an assessment that "gather(s) relevant functional and developmental information when conducting an evaluation to determine disabilities" (3). Further reference is given to a functional behavioral assessment if and when disciplinary action is taken against a child. It clearly states to conduct such an assessment when addressing problematic behavior if an evaluation was not previously completed. (4). What is nebulous are the criteria for completing a functional behavioral assessment. It appears that lawmakers left his vague in the event of being too directive and leaving the nature of behavioral evaluations in the hands of the professionals.

Research in behavioral studies indicates that the purpose of a functional assessment is to "gain knowledge of situational or so called 'setting events,' the contextual conditions that increase or decrease the power of individual-environmental stimuli." (5). Professionals must then implement methods to determine which events in the child's environment are likely to increase of decrease occurrence of the undesirable behavior.

Gable notes two methods to assess behaviors that are frequently used in behavioral research as avenues to gather information "to predict the likely future occurrence of a behavior, based on knowledge of present behavior." (6). Suggested methods include **indirect** assessment using rating scales, checklist, and interviews with respondents to these measures from those familiar with the child (e.g. teacher, peers, parents, other relatives). Another venue for evaluating behavior is a **direct** observation of the child using matrices, scatterplots, Antecedent-Response-Consequence (ARC) records, and/or lag analysis protocols. Gable further notes that many researchers do not use one method exclusively but often triangulate outcomes of multiple methods. In using triangulation the professional gathers data from a variety of sources with various methods and notes any patterns or trends in the child's behavior across settings. Gathering multiple pieces of information about the child makes it more likely to predict behavior in a variety of settings and then provides a framework for designing an appropriate behavior plan.

IDEA in the reauthorization points to the need to generate a plan for those with behavior problems that include "positive behavioral interventions, strategies, and supports to address (the problem behaviors)" (7). Outcomes of functional behavioral assessment facilitate planning and implementing a behavioral program that addresses the individual child's needs and provides a framework for creating supportive interventions for the child's behavioral problems.

Completing a functional assessment also provides documentation in the instance if a child with a disability engages in behavior that warrants disciplinary action. Availability of such an assessment is useful in determining if an incident of inappropriate behavior is a manifestation of the disability; that is, is it behavior for which the student is not able to manage as a result of the disability. To determine if any misconduct is indeed characteristic of the disability a review of the child's behavior is carried out by the IEP team and other qualified personnel (8).

As part of the review team members must gather all assessment results, observations of the child, the child's IEP and placement. Once necessary data is collected the team must then *determine* if the child's placement, IEP, related services, and behavior intervention strategies were appropriate at the time of the disruptive incident; if the child's disability impaired the child's thinking to understand consequences associated with the incident; or if there was evidence that the disability prohibited the child from controlling the disruptive behavior. (9). If results of the review indicate that the disability did not impair the child's thinking or prevent the child from behaving properly and the IEP, placement, and related services were appropriate then the disruptive behavior is *not* considered a manifestation of the disability and the child is disciplined in the same fashion as children without disabilities. (10).

Disciplinary Measures

IDEA's new disciplinary provisions resolve a number of issue while raising several other questions. School personnel are specifically authorized to suspend a student or place a student in an alternative educational setting (AES) for not more than 10 school days. During that time the IEP team must meet and develop a behavior assessment plan or review an existing behavior intervention plan. The new IDEA addresses the dangerousness provisions that were absent on *Honig*. School official now have the authority to place students in an (AES) for up to 45 school days for weapons possession or knowing possession, use , sale or solicitation of drugs.(11)

Weapon is now broadly defined to include a "weapon, device, instrument, material or substance, animate or inanimate that is used for or is readily capable of causing death or serious bodily injury except that such term does not include a pocket knife with a blade of less than 2.5 inches."

Additionally, hearing officers now have the authority previously reserved for judges to order and AES for up to 45 days for students whose presence constitutes a substantial risk of injury to self or others. However, the school district must demonstrate that : a. maintaining the student in current placement is substantially likely to result in injury to the child or others, b. it made reasonable efforts to minimize risk of harm in the current placement including use of supplementary aids and services, c. the proposed AES meets statutory requirements and d. the hearing officer must consider the appropriateness of the current placement. (12)

An Alternative Educational Setting must enable the student to participate in the school's general curriculum. It must enable the student to continue to receive the services and modifications provided in the IEP. It must include services and modifications designed to address the behavior warranting the discipline so that it does not reoccur. This definition has left open for discussion whether cessation of services can ever occur for a special education student and is highlighted by the guidelines for expulsion.

Regarding expulsion boards of education have the authority to impose expulsion for gross disobedience or misconduct that is not a manifestation of a student's disability. The board must apply the same disciplinary procedures applicable to non-disabled students. The district must provide a free and appropriate education during the term of expulsion.

All of the above procedures for discipline require the IEP team to determine whether the conduct is a "manifestation" of the student's disability based upon the following: evaluation and diagnostic results, observation of the child, and the child's IEP and placement. If the conduct is not a manifestation of the disability the special education and disciplinary records are transmitted to the Board of Education for final disciplinary action, including a parent-requested suspension review hearing or expulsion hearing. If the conduct is a manifestation of the disability the IEP team may change or not change the placement depending upon the child's needs. Either way a free and appropriate education must be provided.

The issue regarding IDEA and juvenile authorities investigating crimes was also addressed. The new provision states that no IDEA requirement is intended to prohibit school personnel from reporting crimes. School personnel may report a disabled student's criminal acts to the appropriate law enforcement authority. The district must ensure in such an event that the student's special education and disciplinary records are forwarded to the law enforcement authority. (13)

Finally there is now guidance regarding the discipline of students not yet identified as having a disability. The general rule is that a school district must consider a non-disabled student as a "student with a disability" if it had "knowledge of the student's claimed disability. "Knowledge" is defined in the following manner: a. the parent has expressed concern in writing to the district, b. the behavior or performance of the child demonstrates a need for services, c. the parent has requested and evaluation and d. the teacher or other school personnel has expressed concern about the behavior or performance of the child. If a parent of a student who has not yet been identified as eligible for special education services requests an evaluation during a period of imposed discipline the district must do the evaluation with expediency and the student remains in the placement authorized by the school administrators.

Unresolved Discipline Questions

1. Are manifestation determinations required for suspensions or other sanctions that cause removal from the current placement for 10 school days or less?

2. Are the 10 days counted cumulatively or consecutively? The statute is silent on this matter.

3. AES requires "services and modifications designed to address the behavior so it does not recur." There are no regulations, guidelines, or explanations as to this meaning.

4. Regarding students not yet identified as having a disability, what is meant by "knowledge," How much knowledge is enough to invoke IDEA?

References

1. 20 U.S.C. § 1415 (k)(1) (B)(i)

2. 20. U.S.C. § 1415 (k) (4)

3. 20. U.S. C. § 1415 (b)(2)(A)

4. 20. U.S.C. § 1415 (k)(1)(B)(i)

5. See Robert A. Gable *A Critical Anaoysis of Functional Assessment: Issues for Research and Practitioners,* 22 Beh. Disorders (38) (1996).

6. *spura*, n5, at p. 37

7. 20 U.S.C. 1414 (d)(3)(B)(i)

8. 20 U.S.C. 1415 (k)(4)(B)

9. 20 U.S.C. 1415(k)(4)(C0

10. 20 U.S.C. 1415 (k)(5)(A)

11. 20 U.S.C. s 1415 (k)

12 Id.§1415 (k)(2)

13 Id.§ 1415(k)(9)

Labor Relations In Religiously-Affiliated Educational Institutions

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Introduction

In 1979, in *NLRB v. Catholic Bishop of Chicago*[1] the United States Supreme Court feared that judicial inquiry into, and scrutiny of, the labor and employment relations in religiously-affiliated institutions posed too great a risk of excessive entanglement of the government into the internal theological matters of religiously-affiliated schools. By invoking the First Amendment rights of the religiously-affiliated schools, the Court gave them virtual carte blanche to conduct their labor and employment relations and personnel practices exempt from legal challenge by their staffs. The following year, in *NLRB v. Yeshiva University*,[2] the Court found that college faculty are, generally, supervisors or managers, not "employees," within the meaning of the National Labor Relations Act, and, thus, not able to bargain collectively with their university employers regarding their hours, wages, and terms and conditions of employment.[3]

The ramifications of these decisions often have dramatic debilitating effects on the labor and employment rights of, especially, faculty members teaching in religiously-affiliated schools and colleges and universities. As the twentieth anniversary of *Catholic Bishop* approaches, this paper assesses the tensions between the important prerogatives of the religiously-affiliated institutional employers and the human and civil and labor rights of their employees. The paper begins by reviewing the background leading up to decisions in favor of employees that were recently issued by the highest courts of New York and New Jersey. It next situates the decisions within the larger context of *Catholic Bishop* and suggests how the recent cases may positively reconfigure the labor and employment relations dynamics of religiously-affiliated schools while respecting their authentic religious mission and ministry and necessary managerial prerogatives.

A Brief History of Labor Relations in Roman Catholic Schools

The evolution of collective bargaining, a relatively recent phenomena in the history of American Catholic schools,[4] began shortly after the its rapid spread in public schools. A major impetus behind teachers' unions and collective bargaining came in 1962 by President Kennedy's Executive Order 10988,[5] which established a federal policy granting recognition to unions of governmental employees. The Order gave national expression to a mood that emerged a few years earlier. In 1958, New York City permitted public employees to bargain for the first time, and Wisconsin, in 1959, became the first state to mandate bargaining for municipalities. Since the early sixties, the trend toward bargaining in the public sector, including education, grew rapidly; today, at least thirty five states have adopted labor relations statutes for teachers.

Collective bargaining initiatives by teachers' unions in Roman Catholic schools, the largest and most organized segment of church-operated schools in the United States, began concurrently in high schools in large urban centers in the northeast and midwest, most notably in Brooklyn, Philadelphia, and Chicago. Although the move to unionization in the Brooklyn Diocese progressed smoothly, with the first bargaining sessions taking place between the Lay Faculty Association and the Diocese in the Spring of 1967,[6] the same could not be said for the Archdioceses in Philadelphia and Chicago. In fact, on April 17, 1967, the first "strike" in

American Catholic education history lasted for twenty minutes in Philadelphia before an agreement was reached between the Association of Catholic Teachers and the employing Archdiocese.[7] Four days later, teachers in three Catholic schools in Chicago went on apparently unrelated strikes, lasting from one day to several weeks, which led to the firing of twenty-three striking teachers in one of the schools in May of 1967. Although teachers in Chicago formed the Catholic Archdiocesan Teachers Federation (CATF) in January of 1968, the Archdiocese has continued to refuse to organize the CATF as their bargaining agent.[8]

In 1970, the National Catholic Education Association (NCEA) conducted a self-study of emerging trends in Catholic education. In response to a question asking whether "90% of all dioceses will have teacher associations that will bargain with the [school] board or diocese," 8% of respondents answered that collective bargaining was likely to occur within five years, 70% that it was likely by 1980, and 12% by 1985; only 1% were of the opinion that this was never likely to take place. Moreover, almost 60% of respondents considered the growth of collective bargaining as desirable while less than 30% considered its expansion as undesirable.[9]

Teachers' unions in Catholic high schools grew at a steady, if unspectacular, pace. By 1973, 25 of 145 responding dioceses reported the existence of recognized teachers' associations or unions.[10] However, a study conducted in the summer of 1979, shortly after the decision in *Catholic Bishop*, revealed that the growth of unions had slowed, to the extent that only 27 of 162 Roman Catholic school systems reported having teachers' organizations.[11]

NLRB v. Catholic Bishop of Chicago

The status of unions in Catholic schools received substantial support, when, in 1975, the NLRB asserted jurisdiction over union organizing activities in companion cases in Catholic secondary schools in Chicago[12] and Ft. Wayne-South Bend.[13] The schools, however, refused to comply with the Board order directing them to recognize and bargain with the unions. The schools appealed to the Seventh Circuit, which ruled that the Board improperly exercised its discretion, in light of the religious nature of the schools, and that related First Amendment considerations precluded the NLRB from asserting its jurisdiction.[14] The NLRB appealed to the Supreme Court which granted *certiorari* in February, 1978.[15]

In the interim, the teachers' movement took another step forward in December, 1977, when delegates from seven Catholic Church dioceses, representing 3,300 teachers, met in Philadelphia to form the National Association of Catholic School Teachers (NACST),[16] which expressed hopes of becoming an organization with a membership of 25,000 to 30,000 teachers.[17]

On March 24, 1979, the Supreme Court, handed down its 5-4 decision in *NLRB v. Catholic Bishop of Chicago*,[18] destined to become a landmark in the history of teachers' labor organizations and labor-management relations in Catholic schools. In *Catholic Bishop*, the Court affirmed that the NLRB lacked jurisdiction to mandate bargaining between teachers and their Roman Catholic secondary school employers.

Writing for the Court, Chief Justice Burger framed two issues for consideration: first, whether Congress intended to grant the NLRB jurisdiction over teachers in church-operated schools; and, second, if it did, whether such an action violated the constitutionally sensitive questions arising out of the First Amendment religion clauses. However, Burger then sidestepped the First Amendment issue, by applying the longstanding principle that the Court first enunciated in *Murray v. The Charming Betsy*,[19] which directs the courts not to construe legislation as violating the Constitution if the courts can dispose of cases on other grounds. Consequently, Burger reviewed the legislative history of the National Labor Relations Act, and concluded that there was no affirmative intent on the part of Congress to extend the jurisdiction of the NLRB to church-operated schools. In reaching his decision, Burger was clearly influenced by the Court's desire to avoid having "to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.[20]

In a brief dissent, Justice Brennan maintained that since the Court's interpretation of the NLRA was in error, he would have extended NLRB jurisdiction and the NLRA to protect lay teachers employed by church-operated schools.[21] Yet, he did not further pursue any constitutional law-based rationale, because the Court majority chose not to do so.

Catholic Bishop adversely affected the potential for more viable labor relations in Catholic schools in several ways. First, absent mechanisms in state law, it created a void by leaving teachers without legal recourse to a neutral third-party to settle labor disputes. Second, it challenged the leadership of the American Catholic Church to take the initiative to establish structures and procedures to fill this void. Unfortunately, despite the promise of *Economic Justice For All*, the 1986 pastoral letter of the Catholic Bishops in the United States regarding Catholic social teaching and the American economy, in which the American Bishops explicitly, and eloquently, recognized the rights of workers at all church institutions to organize and bargain collectively,[22] supplementing more than a century of Papal encyclical teachings supporting the rights of workers to organize and bargain collectively,[23] the Church has yet to respond adequately to the challenge presented by *Catholic Bishop*. If anything, Church leaders working in the role of Catholic school employers often appear oblivious to the Church's teachings on the rights of all workers, including teachers in Catholic schools, to join unions and to bargain collectively.

While data on bargaining in these schools is inconclusive,[24] the NACST, the largest Catholic School teachers' organization, representing some 5,000 teachers in 21 affiliated unions mostly in the Northeast, originally hoped to marshal 25,000 to 30,000 teachers. The data do not fully assess, or reflect the legal status of bargaining or the lack thereof, in Roman Catholic schools. Although collective bargaining has certainly decelerated since *Catholic Bishop*, legal and theological issues, conflicts, and possibilities for progress remain where bargaining may continue. For example, in *Catholic High School Association of the Archdiocese of New York v. Culvert*,[25] the Second Circuit held that the First Amendment did not prohibit the New York State Labor Relations Board (NYSLRB) from asserting jurisdiction in a conflict between lay teachers and the Catholic schools in which they are employed. The Second Circuit distinguished *Culvert* from *Catholic Bishop* on the ground that, unlike the NLRA, which evidenced no intent to bring Church-operated schools within the jurisdiction of the NLRB, the New York State Labor Relations Act was amended explicitly in 1968 to bring employees of educational or religious associations within its purview. Thus, the Second Circuit dismissed the First Amendment challenges brought by the schools, and permitted the NYSLRB to retain its jurisdiction.

Following *Culvert*, at least two additional labor disputes involving Roman Catholic secondary schools were brought successfully before the NYSLRB. In *The Matter of St. John's Preparatory School and Lay Faculty Association*, the NYSLRB found that the school unlawfully refused to bargain in good faith with the teachers' labor association, that the ensuing strike was precipitated by unfair labor practices on the part of the school, and that the school acted improperly in dismissing seventy-six striking teachers in September of 1984.

A second case, involving a 1981 strike at Christ the King High School in Middle Village, New York City, in which 96 teachers were dismissed under circumstances similar to those at St. John's Preparatory School, has also recently been resolved in favor of the teachers.

Positive Developments from New York and New Jersey Courts

New York State Employment Relations Bd. v. Christ the King Reg. High Sch.

In June, 1997, the New York Court of Appeals unanimously affirmed that the NYSLRB could enforce its orders regarding a Catholic secondary school employer, requiring it to bargain in good faith with the union and reinstate certain teachers whom the school, as employer, had dismissed from employment. According to the court, compliance with the mandates of secular labor law did not violate the Catholic school's First Amendment rights. The court held that the NYSLRB could compel good faith bargaining by the Catholic school, because First Amendment protections from excessive government involvement into the internal theological matters of the Catholic Church do not summarily preclude government regulation of the effectively secular aspects of the school's labor relations.

Christ the King Regional High School, a Catholic school in New York City employs lay and religiously-affiliated faculty, and teaches secular and religious subjects. Until 1976 the school was operated by the Diocese of Brooklyn when responsibility and title were conveyed to the school per se, contingent upon its continuing to operate as a Roman Catholic school. In 1976, a union began representing the lay faculty, but it failed repeatedly to negotiate a bargaining agreement with management on behalf of the faculty. These repeated failures precipitated a strike in 1981 when the school fired all striking workers and summarily ended labor negotiations.

The NYSLRB pursued alleged employer violations of the New York State labor law, including failure to bargain in good faith, and improperly discharging and not reinstating striking employees. In federal court, the school challenged the state Board's jurisdiction as preempted by the NLRA, and as unconstitutionally intrusive on the school's First Amendment rights. The district court rejected this complaint, and was affirmed by the Second Circuit on the preemption issue only. An administrative law judge (ALJ) confirmed the NYSLRB's complaint and the Board brought suit to have the ALJ decision enforced under New York State Labor Law § 707. The school moved to dismiss the petition on the constitutional law defense claims.

The New York Court of Appeals granted the Board's petition, and denied the school's motion to dismiss, affirming the decision of the Appellate Division[26] The Court held that the NYSLRB's inquiry did not impinge on the school's First Amendment right to free exercise of religion. The court explained that the New York State Labor Relations Act is neutral in theory and in fact, with no implication of adverse or unconstitutional restriction necessarily on religious beliefs or activities. Relying on the Supreme Court's decision in *Employment Division, Oregon Dept. Of Human Resources v. Smith*,[27] the court concluded that since the intent of the state labor law was not directed towards religion, and the effect of the state labor board's compelling good faith negotiation only incidentally affected religion, there was no violation of the First Amendment per se, although the Court noted that there could be violations in other cases, depending on the particular facts.

The court also held that the labor law did not violate the Establishment Clause of the First Amendment. Distinguishing the case at hand from *Catholic Bishop of Chicago v. National Labor Relations Board*,[28] in that statutory interpretation was not at issue, the court explained that the labor law simply imposes secular regulations on such contract terms as wages and working conditions. It reasoned that the mere possibility of such regulations interfering with religion was not sufficient to prevent the labor law's useful application.

The New York Court of Appeals mentioned briefly that the Labor Board could compel the reinstatement of a teacher who was expelled for "unchristian behavior," in light of the school's failure to present any evidence of an inherent religious motive for firing the particular faculty member. Thus, mere invocation of the institutional employer's religious affiliation will no longer be sufficient to avoid summarily any further scrutiny into its labor relations by the administrative or judicial instruments of the secular state.

South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch.

Within six weeks of the New York Court of Appeals decision in *Christ the King*, the Supreme Court of New Jersey ruled that lay teachers in religious schools can pursue their state constitutional right to unionize and can bargain collectively with respect to secular aspects of their employment without any violation of the Religion Clauses of the Constitution. In *South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Elementary School*,[29] the court unanimously held that the lay teachers had the enforceable right to unionize and to negotiate, provided that the scope of the labor negotiations only incidentally effect the institutional employer's free exercise of religion protected the First Amendment.

St. Teresa is one of the elementary schools operated by the Catholic Diocese of Camden, New Jersey, with each school employing a number of lay teachers. The South Jersey Catholic School Teachers Organization is an organization of non-clerical, lay teachers that was elected as the bargaining representative by a majority of the lay faculty. Subsequently, the union sought recognition from the Diocese as the bargaining representative. However, a Board of Pastors, acting as agents for the Diocese, informed the union that its recognition was contingent upon the signing of a document entitled "Minimum Standards for Organizations Wishing to Represent Lay Teachers in a Parish or Regional Catholic Elementary School in the Diocese of Camden," containing nonnegotiable standards. The "Minimum Standards" vested complete and final authority to dictate the outcome of disputes in the Board of Pastors and prohibited the union from assessing dues or collecting agency fees from non-union members. The union refused to accept the standards. When the Diocese failed to recognize the teachers' union, the union brought suit based on Article 1, Section 19 of the New Jersey State Constitution, which expressly grants public and private workers the constitutional right to organize, claiming that union acceptance of the proposed standards would have amounted to bargaining prematurely away a number of lay teacher rights. The schools claimed that compelling them to bargain with the union would have violated the Free Exercise and Establishment Clauses of the First Amendment.

The high court in New Jersey modified and affirmed the judgment of the Appellate Division, while remanding for further proceedings. The court held that the lay elementary school teachers had an enforceable state constitutional right to unionize and bargain collectively, but limited the scope of this right to the secular terms of conditions of employment.

The court began its reasoning with a comparison to *NLRB v. Catholic Bishop*. The court recognized that this decision supported only federal NLRB jurisdiction, but distinguished the state constitutional section due to its express language. It further explained that because New Jersey's provision is implemented by the judiciary, not a state labor board, it involves less comprehensive supervision of religion and more assurance that the First Amendment protection of religion will be recognized and honored. The court concluded that since the state constitution was not preempted by the NLRB, its enforcement was constitutional, since enforcement would not interfere with First Amendment Constitutional rights.

The court considered the enforcement of the state provision under the Establishment Clause, applying the excessive entanglement test of *Lemon v. Kurtzman*.[30] Both parties agreed that the provision served the secular purpose of advancing economic welfare through the right to organize and bargain; thus, the first prong was quickly satisfied. The court further noted that the provision was not primarily directed at inhibiting religion, but at requiring private employers to bargain. This allowed the provision to pass the second *Lemon* test prong, bolstered by the observation that the Diocese has a history of voluntarily engaging in collective bargaining over secular issues, an activity the church would not have engaged in if it was truly threatening. The court added that the constitutional provision did not violate the excessive entanglement prong since it only required negotiation over wages and benefits. The State would not decide or impose upon the employer the specifics of the final labor agreement, and that neutral criteria would be used to insure that religion was neither advanced nor inhibited. Thus, the court asserted that since the *Lemon* requirements were satisfied, the Establishment Clause was not violated. The court also determined that the provision did not infringe upon the Free Exercise rights of the Catholic school as employer. Applying the test set forth in *Smith*, the court maintained that since the constitutional provision was a generally applicable regulatory law, intended to encourage the rights of employees to bargain but not to regulate religion, and since it only incidentally burdened the free exercise of religion, it was not an unconstitutional encroachment on the free exercise rights of the Church school as employer. The court further concluded that even if the school's claim met the hybrid exception to *Smith*, New Jersey does have a compelling interest in labor relations peace that justifies imposing collective bargaining obligations upon the Catholic Church-affiliated schools.

Of course, other recent decisions continue to conform reflexively to *Catholic Bishop*.[31] Yet, these two important 1997 decisions of the high courts of New York and New Jersey demonstrate the more enlightened possibilities of avoiding the one dimensional jurisprudential reflexivity of *Catholic Bishop*. *Christ the King* and *St. Teresa* may point the way to an enlightened integration of the labor rights of workers with the authentic autonomous theological prerogatives of the religiously-affiliated institutional employers to require teachers to comply with the fundamental moral norms and teachings of their faiths.

Discussion

The so called non-negotiable "Minimum Standards" clauses at issue in situations like *St. Teresa* raise interesting jurisprudential, labor relations, and educational implications. Broadly analogous to the ministerial exemptions recognized under Title VII, whereby, for example, the Catholic Church may refuse to ordain and employ an atheist non-Catholic as a priest, it is fully understandable that management would expect personnel in religiously-affiliated schools to be dedicated to the transmission of the Catholic faith's values and traditions to its students, and to demonstrate acceptance of, and adherence to, core Catholic beliefs. At the least, administrators in religiously-affiliated schools should have the freedom to hire teachers and staff members who respect the religion's teachings, even if the employees' beliefs are different. For example, it is reasonable to expect that female teachers in Catholic schools will not indiscriminately become unwed mothers or that teachers will not openly proselytize for abortion. Clearly, Church leaders neither want to, nor should have to, relinquish either their essential beliefs or their fundamental managerial rights through collective bargaining, since such a negation of responsibilities would vitiate the core values as the heart of what it means to be a religiously-affiliated institution. Yet, in light of the particularly non-negotiable "Minimum Standards" summarily demanded by the Diocese, this was the not the path that the union sought to pursue in *St. Teresa*.

The argument of Church leaders in *St. Teresa* that bargaining would have threatened Church autonomy and would have infringe upon the Church's relationship with ministerial employees was wholly specious. To the extent that ecclesiastical leaders cooperated with their employees by effectively implementing Church teachings on the labor rights of workers, they would have give witness to how the Church's social teaching can triumph over the narrow positivism of the civil law. In fact, in *St. Teresa*, the Supreme Court of New Jersey pointed out that the contract that the diocese had with its high schools contained carefully crafted language limiting the scope of bargaining to the terms and conditions of employment while allowing the school to preserve managerial prerogatives.

In an era of school reform wherein teacher empowerment is designed to give faculties greater voice in the daily exercise of their profession duties, a positive response from Church leaders can further serve as a powerful example of how effective shared decision making can be. By entering into labor contract negotiations with teachers' unions over terms and conditions of their employment, dedicated lay teachers who staff the schools can be made full partners in the enterprise of educating children.

The reliance of Church leaders on the Supreme Court's narrow construction to preclude the NLRB's jurisdiction over teachers in religiously affiliated schools ignores their First Amendment rights. Maintaining the shattered edifice of *Catholic Bishop* heightens the irony of the Church's reliance on federal law to deny teachers the right of association that state courts, at least in New York and New Jersey, have recently, and wisely, safeguarded.

Endnotes

1. 440 U.S. 490 (1979).

2. 444 U.S. 672 (1980).

3. For an interesting recent development, see Courtney Leatherman, *NLRB May End Its Oppositions to Unions for Private-College Professors,* The Chronicle of Higher Education, January 8, 1998, at A14.

4. For a history of Catholic education in the United States, see Harold A. Beutow, OF SINGULAR BENEFIT: THE STORY OF CATHOLIC EDUCATION IN AMERICA(1975).

5. Anthony M. Cresswell & Michael Murphy, TEACHERS, UNIONS, AND COLLECTIVE BARGAINING IN PUBLIC EDUCATION 149 (1980).

6. Clifford, Teacher Collective Action, 27 Catholic HSQ at 5-6 (1969).

7. M. Scatena, The Development of Collective Bargaining in the Catholic Secondary Schools of the Commonwealth of Pennsylvania, at 58 (1984) unpublished doctoral diss., University of Pittsburgh).

8. Sullivan, Catholic Institutions, at 124.

9. Catholic Educators Predict Changes, National Catholic Reporter, Nov. 13, 1970, at 9, col. 1.

10. NCEA Symposium: Unionism in Catholic Schools, 6 Origins 277, at 287 (1976).

11. John Augenstein, TEACHER UNIONS, THE COURTS AND CATHOLIC SCHOOLS IN CONTEMPORARY ISSUES IN CATHOLIC HIGH SCHOOLS, at 77 (1981).

12. Catholic Diocese of Chicago, 224 N.L.R.B. 1221 (1976) (involving two high school "minor seminaries," wherein students began studies for the Catholic priesthood).

13. Diocese of Ft. Wayne South Bend, Inc., 224 N.L.R.B. 1226 (1976) (involving Five Catholic high schools wherein no special attention was paid to preparing students for the priesthood).

14. Catholic Bishop of Chicago v. N.L.R.B., 559 F.2d 1112 (7th Cir. 1977).

15. 434 U.S. 1061 (1978).

16. Sullivan, Catholic Institutions at 84.

17. Askin, *Catholic Schools in Unions Mostly Out*, Nat'l. Cath. Rep., August 13, 1982, at 13, col. 1.

18. 440 U.S. 490 (1979).

19. 2 Cranch 64 (1804).

20. 440 U.S. at 507.

21. 440 U.S. 490, 508 (Brennan, J., dissenting).

22. United States National Conference of Catholic Bishops, ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE UNITED STATES ECONOMY, 176 (1986). The relevant passage reads: "All church institutions must also recognize the rights of employees to organize and bargain collectively with the institution through whatever association or organization they freely choose."

23. Beginning with Pope Leo XIII's *On the Condition of the Working Class* in 1891 to Pope John Paul II's *On Social Concern* in 1987, papal teachings have consistently and explicitly supported the rights of workers to organize and bargain collectively. For a discussion of many of these documents, see David L. Gregory and Charles J. Russo, *Overcoming NLRB v. Yeshiva University by the Implementation of Catholic Labor Theory*, 41 Labor Law Journal 51 (1990); David L. Gregory *Catholic Social Teaching On Work*, 49 Labor Law Journal 912 (1998).

24. The National Catholic Association (NCEA), in its most recent report, indicates that 23% of schools reporting that at least some of their teachers are represented by some type of negotiating group. Michael J. Guerra, DOLLARS AND SENSE: CATHOLIC HIGH SCHOOLS AND THEIR FINANCES, (1995) at 14.

25. 753 F.2d 1161 (2d Cir. 1985).

26. 660 N.Y.S.2d 359 (NY 1997).

27. 494 U.S. 872 (1990).

28. 440 U.S. 490 (1979).

29. 696 A.2d 709 (N.J. 1997).

30. 403 U.S. 602 (1971).

31. *See*, Association of Catholic Teachers v. Pennsylvania Labor Relations Bd., 692 A.2d 1039 (Pa. 1997). (holding that since teachers and librarians in Catholic Schools are not "public employees" within the scope of the Pennsylvania Public Employee Relations Act, they are not entitled to organize or bargain collectively with their employer.) But see Central Catholic Educ. Ass'n. v. Archdiocese of Portland, 891 P.2d 1318 (Or. Ct. App. 1995) (affirming that the diocese was subject to the jurisdiction of the NLRB); *see also*, *Hill v. Federation of Teachers*, 471 N.W.2d 372 (Minn. Ct. App. 1991).

Leandro vs. State of North Carolina: The Constitutionality of the North Carolina Public School Finance System

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Leandro vs. State of North Carolina: The Constitutionality of the North Carolina Public School Finance System

This session analyzes the ruling of the North Carolina Supreme Court on a challenge to constitutionality of the state's system of financing its public schools, grades K through 12. Over the past three decades, more than thirty state high courts have ruled on the constitutionality of their states' school finance system and researchers continue to analyze and contrast these courts opinions to look for similarities and differences. In the North Carolina case, the court reviewed prior cases in other states and takes a different route in seeking redress for plaintiffs challenging the finance system in that state.

North Carolina joins approximately thirty other states where their financial system for public education is being challenged as unconstitutional (Wood and Thompson, 1993). On July 24, 1997 the North Carolina State Supreme Court upon hearing a challenge to the adequacy of funding public education held that the State had a responsibility to provide every child with a "sound basic education"*(Leandro, 1997)*. According to the High Court the state shall provide a general and uniform system of free public schools, with equal opportunities for all children. The Court reasoned that the primary issue was whether the state is required to provide children with an education that meets some minimum standard of quality. The answer is, yes. An education that prepares students to participate and compete successfully in the society in which they live and work.

The Court agreed that each child in the state should be afforded a "sound basic education" but did not agree that the Constitution required the state to provide each district equal funding on a per pupil basis. A sound basic education should sufficiently provide each student with *(Leandro, 1997:346)*:

1. The ability to read, writes, and speaks English and knowledge of mathematics and science to enable the student to function in society.

2. Knowledge of geography, history, and economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or the student's community, state, and nation.
3. Academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training.
4. Academic and vocational skills to enable the student to compete on an equal basis with others pursue further formal education or find gainful employment.

This ruling by the North Carolina High Court is different from any of the prior hold By other state courts, but to understand this Court, you must understand the unique features of the North Carolina school finance system.

North Carolina's School Finance System

Since 1933 the **state has been responsible for funding instructional programs in all school districts.** The state pays the salaries of teachers and administrators, funds for supplies, transportation, and books. These formulas are unlike those in other states, where state funding formulas are used to calculate the amount of state funds to be given to local school districts to spend, with wide discretion. In North Carolina, the state provides the resources needed to supply the state's standard course of study to students in all school districts based upon average daily membership (ADM).

North Carolina local school districts do not have taxing authority. School districts must get the approval of their county commissioners to tax residents for support beyond that received from the state. Nearly 90 percent of all students are enrolled in countywide school districts. In the annual ritual of school funding, the Legislature decides annual salary increases for teachers and administrators. In the low wealth counties, most of their operating budgets come from state funds. There is little or no local supplements to increase teacher salaries, add new positions, or purchase additional supplies. In medium wealth districts, school boards may convince county commissioners to levy a local property tax to increase teachers' salaries above the state salary schedule for teachers and administrators. However, in the high wealth districts, county commissioners are more likely to approve a tax levy to support local supplements to raise teachers' salaries above the state salary schedule. There is no direct citizen vote on tax resources for operational expenses for schools, but county commissioners allow local residents to vote directly on school bond issues.

In 1991 the Legislature enacted two programs to help poor and small school districts: the Low-Wealth supplemental Funding Program and the Small-Schools Supplemental Funding Program (Liner, 1992). School districts may receive funds under the Low-Wealth Supplemental Funding Program if their property tax base per student, as adjusted for assessment levels and modified by relative income levels, is below the statewide average level of property tax base. The Small-Schools Supplemental Funding Provides additional resources to school districts with enrollments below 3,000 and to districts with total enrollments of 3,000 to 4,000 whose adjusted and modified property tax base per student is below the statewide average.

The 1933-finance system is basically, still in place, but in 1995 the state improved the system with a new financial plan called the Basic Education Program (BEP). The BEP established standards for the level of funding for the state's basic curriculum, developed a standard course of study and specified the state's responsibility for financing it. The BEP also added state support for teachers in the arts, music, and foreign languages; and set competency standards by grade levels in each area of the curriculum, standards for promotion, support programs, staffing, class size, and facilities. By adopting these standards, the state promised to pay the full operating budget required to provide the standard course of study. But, the BEP was never been fully funded.

However, differences in school expenditures do not truly represent the state's role in creating funding disparities between school districts. The state pays the salaries of all professional personnel, but it does **not** provide a set dollar amount for each position. School districts are free to hire all teachers that place at the top of the state salary schedule and be reimbursing by the state accordingly. Therefore, school systems employing more experienced teachers or teachers with graduate degrees will receive more state funds than systems hiring less experienced teachers or fewer teachers with graduate degrees. In general, low wealth districts employ on the average more teachers with less experience and fewer teachers with graduate degrees resulting in less state funding.

The State assumes the full cost of a basic education program for each student. Using a state salary schedule, the state pays the salaries of all K-12 teachers and administrators for the basic education program. The state supplies one teacher and one teacher's aide for each class of 23 students in grades K-3 and one teacher for each class of 30 students in grades 4-12. Kindergarten programs are full time through out the state. Some districts supplement personnel salaries and add additional teaching and administrative positions with local funds.

The Case

On May 25, 1994 plaintiffs from five low wealth school districts sought through state court a declaratory judgment action against the State challenging the fairness of its method for financing public education. In October 1994 six urban school systems enter the case as intervenors. The case was filed before district court in one of the low wealth districts, but later move to the Raleigh, the State Capital.

The plaintiffs allege that they have a constitutional right to equal educational opportunities and those rights are being denied under the state's school funding system. The plaintiffs' major arguments against the State were that:

1. Children in their districts are not receiving a sufficient education to meet the minimal standard for a constitutionally adequate education.
2. Children in their districts are denied an equal education because there is a great disparity between the educational opportunities available to children in their districts and those offered in more wealthy districts of the State.

According to the urban school districts the State violated the Constitution by failing to take into consideration the burdens faced by their districts to meet the needs of students with extraordinary educational needs. The urban schools claimed that:

1. Urban schools have a large number of students who require special education services, serve a disproportionate number of poor children, children with language barriers, or other handicaps.
2. Because urban counties have high levels of poverty, homelessness, crime, unmet health care needs, and unemployment, which drain their resources, and prevent them from allocating a larger portion of their local tax revenues to public education.

The High Court agreed to hear the case and reviewed problems experienced in states where their courts had held that their state constitutions guaranteed the right to equal educational opportunities and concluded that such holdings were impractical or unattainable.

The Court felt that the state has inherent power to do those things reasonably well. But, a funding system that distributed state funds to districts in an arbitrary and capricious manner unrelated to sound educational objectives may result in a denial of equal protection and due process.

The Court felt that some of the plaintiffs claims for **relief** may be granted if they are supported by substantial evidence. The case was remanded to the trial court to permit plaintiffs to proceed on those claims. The trial court may consider educational goals and standards adopted by the legislature for its determination as to whether children are being denied a sound basic education. The trial court may consider the performance level of children on standard achievement tests, but standardized tests must not be treated as absolutely authoritative. The trial court may also consider the level of the state's educational per-pupil expenditures and other appropriate factors when determining educational adequacy issues.

If the trail court makes findings and conclusions that the state is denying children a sound basic education, a denial of a fundamental right will have been established. It then becomes incumbent upon the state to establish that their actions denying this fundamental right are necessary to promote a compelling governmental interest. If the state is unable to perform its constitutional duty, then the court must enter a judgement to correct the wrong. The state could narrow the range of cost per pupil across school districts.

The North Carolina Court did not follow a trend set by other state high courts that issued holdings mandating that their states equalize educational opportunities across school districts (*Leandro, 1997:257)*. And concluded that such a decree would be impractical and generate countless legal challenges.

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C.5 Violence and Threats of Violence in Public Schools: Reasonable Force, Restraint and Discipline Strategies

Education Law Association Annual Conference
November 21, 1998
8:00 a.m. to 9:15 a.m.

Violence in the school setting is a problem of national proportions with implications for negligent liability, denial of due process, violation of privacy rights and a host of related claims. Proactive approaches to this issue involve implementing effective disciplinary strategies and influencing school climate. This presentation will deal with a range of legal issues and provide practical guidance from diverse standpoints reflected by the backgrounds of the panel.

The panel will address a series of scenarios involving issues of student misconduct in the public school setting and offer point-counter-point in discussing the legal and practical problems associated with each scenario. The participants will address the issues in the scenarios from their respective perspectives. A framework for school safety will emerge that will include crisis management and intervention, discipline strategies and documentation policies, fostering a positive school climate, and developing staff and student competency in dealing with violence. Questions and comments from the audience will be solicited as alternatives to the scenarios are discussed.

Moderator:

Joseph Beckham (Professor, College of Education, Florida State University) is a past president of the Education Law Association with thirty years of experience as a counselor and consultant on education law issues.

Panelists:

Patrick Gray (Professor, College of Education, Barry University) is chair of the Florida Education Practices Commission, which developed and implemented the Code of Professional Ethics for Florida Teachers. He is a former Dade County Associate Superintendent of Schools and school administrator.

Wolfgang W. Halbig (District Security Chief, Seminole County Public Schools) has been a highway patrol trooper, teacher, coach, dean of students, and director of an alternative high school for students expelled from the public school system. For the past three years he has been director of security for the Seminole County Public School System.

Charles Wolfgang (Professor, College of Education, Florida State University) has been a teacher, counselor and administrator in public schools. He has written extensively on dealing with discipline problems in public schools, and regularly provides consulting services to schools and school districts designed to assist schools to deal with discipline problems through a comprehensive plan for student discipline.

Scenario One

The thirteen-year-old male committed suicide at home. His family discovered that, in the days before his suicide, he had attempted suicide twice while at school. Prior to his death, the family had no knowledge of the boy's suicidal intent, but they were aware that he had emotional and behavioral problems, which indicated to them a need for counseling. In the first instance of attempted suicide, another student discovered the boy in the lavatory trying to hang himself with a football jersey. That student informed his mother, who reported the incident to the Dean of Students by telephone. The Dean was reported to have investigated by bringing the boy into his office and reading and discussing selected Bible passages, but took no further action. The boy's second attempt also occurred in the boy's lavatory. A school custodian discovered the boy attaching a wire coat hanger to ceiling pipes and the boy admitted his intention to kill himself. The custodian informed a school principal, but did not know the boy's name. The principal asked the custodian if she could not find anything else to do. [Refer to Wyke v. Polk County School Bd., 129 F.3d 560 (11th Cir. 1997) for the genesis of this hypothetical. See also Grant v. Board of Trustees, Valley View School, 676 N.E.2d 705 (Ill.App. 1997).]

1. THE CONTEXT OF SCHOOL DISCIPLINE: REASONABLE PRUDENCE, RISK MANAGEMENT & SAFETY AND SECURITY IN THE SCHOOL SETTING

A public school is not the insurer of a student's safety, but school officials must foresee potential dangers in the school environment, anticipate the injurious consequences of actions, and take appropriate steps to reduce risks [See Fontenont v. State of Louisiana, 635 So.2d 627 (La. App. 1994)]. School officials will not be held liable when they could not have foreseen, in the reasonable exercise of their legal duty to a student, the injurious consequences of an activity or action [Malik v. Greater Johnstown Enlarged School, 669 N.Y.S.2d 729 (App.Div. 1998) and Green by and through Green v. Bester, 568 So.2d 515 (Ala. 1990)]. An accident or injury must have been foreseeable in order to establish a basis for a causal relationship between a breach of duty and an injury [Schrader By Schrader v. Board of Educ., 671 N.Y.S.2d 785 (App.Div. 1998) and Tomlinson v. Board of Educ., 583 N.Y.S.2d 664 (App.Div. 1992)].

Foreseeable risks take several forms. The first and most obvious foreseeable risk is one which has occurred previously in the same or similar circumstances. This principle would require that school officials establish a higher level of supervision for students who had committed previous acts of violence against other students [King v. Dade County Bd. of Public Instruction, 328 So.2d 515 (Fla.App. 1973), but see Coleman v. Joyner, 593 So.2d 451 (La.App. 1992) (a single instance of suspension for fighting would not establish a foreseeable risk that the student would act violently in causing injury to another student)]. A second form of foreseeable risk involves an inference that a school rule or district policy was created in order to insure the safety or protection of students.. When the rule or policy is violated by school employees, negligence may be presumed. For example, the failure of school officials to comply with a board rule for supervision of sponsored club activities was regarded as the proximate cause of a student's injury in a high school hazing beating [Bryant v. School Bd. of Duval County, 399 So.2d 417 (Fla. App. 1981)]. A third form of foreseeable risk acknowledges a high probability that a behavior proximately causing injury will occur. Under this construction, a probability of risk must be sufficiently high to impose a heightened duty of care on school officials [See Watts v. Wayne County Bd. of Educ., 412 S.E.2d 541 (Ga.App. 1991) (evidence that there had been prior fights in a school recess area was not sufficient to establish a duty of supervision specific to intervening in an altercation between students)].

The law requires school officials to meet a general duty to provide reasonable, prudent care for the safety of students and visitors to the school. Since school officials stand in place of parents in their relationship to students, a specific duty to provide adequate supervision is consistently recognized by courts. In any school situation, the level of supervision should be directly correlated to the degree of foreseeable risk involved [Williams v. Columbus Bd. of Educ. 610 N.E.2d 1175 (Ohio App. 1992)]. Insuring the safety of students and a secure campus is closely related to the duty of adequate supervision [See Guitierrez v. Dade County School Bd., 604 So.2d 852 (Fla. App. 1992) (failure of school officials to provide adequate security in school parking lots), but see Brownell v. Los Angeles Unified School Dist., 5 Cal.App. 1992) (no duty to protect student randomly shot at school bus site adjacent to public school)].

Managing risks in the school setting includes establishing and maintaining safety rules for classroom and supervision areas, regularly inspecting for potential hazards in order to identify and reduce foreseeable risks in the school setting, consulting with professional colleagues about the appropriateness and safety of activities, conducting regular inservice for students and staff on school safety rules and procedures, and establishing and enforcing disciplinary policies. In planning activities and developing safety rules, always consider the age, maturity, and ability of students, giving special consideration to students with disabilities [Kimberly M v. Los Angeles Unified School Dist., 242 Cal. Rptr. 612 (Cal.App. 1987) and Sutton v. Duplessis, 584 So.2d 362 (La.App. 1991)].

A duty of supervision is implicated in controlling students who are disruptive or violent. In a Florida case, a school district was liable when an emotionally handicapped student in a vocational shop class was sexually assaulted by two students in the class. Just prior to the assault, the two students had threatened and harassed the handicapped child and the teacher had intervened to break up the conflict. The sexually aggressive behavior of one of the students who assaulted the handicapped student was known to school officials. Reviewing these facts, the state appeals court found that the duty of adequate supervision was heightened by a unique combination of factors, including intermingling of regular and handicapped students, the oversized shop classroom, the history and background of the student involved and the aggressive behavior of the students who had initially threatened and harassed the disabled students[Collins v. School Bd. of Broward, 471 So.2d 560 (Fla.App. 1985)]. In another case, a visiting parent who was struck on school grounds by a student with a documented history of threats of violence and unprovoked attacks on teachers and students could claim that school officials should reasonably have foreseen the potential violent conduct of the student and taken steps to protect the parent [Garufi v. School Bd. of Hillsborough, 613 So.2d 1341 (Fla. App. 1993)].

Scenario Number Two

The student was subject to disciplinary action for an offense that took place off school grounds. In this instance, the student had thrown a rock through a car window, injuring the occupant of the car. Because the rock led to an injury, the fifteen-year-old was charged with aggravated assault, a felony. Before the incident, the student had been in the regular classroom setting, but after his arrest, he was reassigned to an alternative school which resulted in a decrease in his ability to accrue credits toward graduation. His placement in the alternative school was automatic under a Board policy which accorded with state statute law providing that any student involved in behavior punishable as a felony must be removed from the regular education program and placed in an alternative education program. There was no provision for due process in the student's transfer to the alternative school. [Refer to Nevares v. San Marcos Consolidated School Dist., 954 F.Supp. 1162 (W.D.Tex. 1996) for the genesis of this hypothetical.]

2. PROCEDURAL DUE PROCESS: NOTICE OF THE NATURE OF THE MISCONDUCT & AN OPPORTUNITY TO BE HEARD

The student's right to due process involves both procedural and substantive protections. Substantive due process imposes an obligation to act reasonably. Procedural due process requires that school officials act in accordance with generally recognized procedures. The leading United States Supreme Court decision on procedural due process remains *Goss v. Lopez* [419 U.S. 565, 98 S.Ct. 729 (1975)]. The protections of procedural due process, including notice and a presuspension hearing at which the student can contest the suspension, were required in order to safeguard against the erroneous deprivation of an entitlement to an education or the stigma of an allegation of serious misconduct. The reasoning in *Goss*, requiring notice and a hearing in long-term suspensions or expulsions, was extended to cases involving the disciplinary transfer of a student from high school to an alternative school in a Florida school district [W.A.N. v. School Bd. of Polk County, 504 So.2d 529 (Fla.App. 1987)].

While few cases involving in school or short term suspensions have been reviewed by federal courts since *Goss*, a few recent decisions reaffirm that school officials should provide informal due process whenever disciplinary actions are contemplated. For example, a high school student who was suspended for ten days by a school principal and excluded from various extracurricular events for his role in distributing abusive and obscene documents about classmates received adequate due process when the principal gave the student notice that his conduct could subject him to suspension, cited relevant sections of the student handbook which prohibited the student's conduct, and gave the student several opportunities to be heard and present his view of what happened [Donovan v.Ritchie, 68 F.3d 14 (1st Cir. 1995)]. In another case involving two students in separate circumstances, a federal court found no violation of due process. One of the students was suspended for ten days for fighting with another student, threatening teachers and screaming obscenities. A second student was suspended for nine days for the possession of a "look alike" drug and reassigned to an alternative school pending the outcome of drug testing. In the first student's case, the court emphasized that giving a student notice of the nature of the misconduct and an opportunity to explain that conduct is all that is required under the law. Although the student was disruptive and distraught at school, her removal from school was compelled before an informal hearing could be provided. However, the hearing was provided in a telephone interview between the student, her mother, and the school principal latter that day. In the second case, only a rudimentary hearing was required to impose the nine day suspension, just as in the first case. In the second case, the student and his grandparent had met with the principal initially, and a latter hearing with parents present was conducted when the decision on placement in an alternative school was made [C.B. By and Through Breeding v. Driscoll, 82 F.3d 383 (11th Cir. 1996)].

Scenario Number Three

A high school junior got into a shouting match with another female just as the teacher, who had left the room momentarily while students were working on individual projects, returned. The teacher told both students to sit down, and intervened when one charged the other. The teacher directed the threatened student to leave the room, and she claimed she was about to do so when the teacher reached over a desk, grabbed her arm, and forcibly jerked her toward the open classroom door. The student sustained a broken wrist when she fell to the classroom floor. [Refer to Wallace v. Batavis School Dist., 68 F.3d 1010 (7th Cir. 1993) and Jones v. Witkinski, 931 F.Supp. 364 (M.D.Pa. 1996) for the genesis of this hypothetical.]

3. APPLICATIONS OF DISCIPLINE: USE OF EXCESSIVE FORCE & CORPORAL PUNISHMENT

The United States Supreme Court has ruled that the use of corporal punishment in public schools does not violate the Eighth Amendment's prohibition against cruel and unusual punishment {Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401 (1977)], however, grossly excessive corporal punishment such as that which would be accompanied by extreme force, physical pain and injury may violate due process of law under the Fourteenth Amendment [Kubany by Kubany v. School Bd. of Pinellas, 818 F.Supp. 1504 (M.D.Fla. 1993)]. The use of excessive force while performing an authorized act related to the maintenance of discipline in a public school setting may implicate a claim for negligence [Williams v. Cotton, 346 So.2d 1039 (Fla.App. 1977)] or violation of a substantive right to due process [P.B. v. Koch, 96 F.3d 495 (6th Cir. 1996)]. Claims that a school employee used excessive force most often arise in circumstances involving the administration of corporal punishment and in situations in which the employee asserts the privilege to use reasonable force to defend oneself or others. In the former circumstance, the school official is protected by qualified immunity if the use of corporal punishment is consistent with formal district policy and reasonable under the circumstances [See Grimes v. Stringer, 957 S.W.2d 865 (Tex.App.1997) and Rinehart v. Board of Educ., 621 N.E.2d 1365 (Ohio App. 1993)]. In one case, a fourteen-year-old student who was involved in a fight at school was punished with five licks of a paddle. Bruising resulted, and the parents sued the school district and the teacher who administered the paddling for violation of substantive due process rights. A federal appeals court ruled that the conduct of the teacher was protected by qualified immunity even though the parent had withdrawn permission for the use of corporal punishment, since the paddling was not so severe, so disproportionate to the need presented, or so inspired by malice of sadism that paddling shocked the conscience [Saylor v. Board of Educ. of Harlan County, 118 F.3d 507 (6th Cir. 1997)].

Several federal appeals courts have held that a student's substantive constitutional right to be free from brutal and harmful state intrusion into the realm of personal privacy and bodily security may be impaired by the use of excessive corporal punishment [See Metzger by and through Metzger v. Osbeck, 841 F.2d 518 (3rd Cir. 1988), Garcia by Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987); and Webb v. McCullough, 828 F.2d 1151 (6th Cir. 1987)]. A cause of action based upon substantive due process rights would include an analysis of the force applied and the severity of the injury, together with a determination of whether the punishment was disproportionate to the misconduct, and was inspired by malice or sadism rather than a careless excess of zeal [Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980)]. To avoid liability, federal courts have emphasized procedural safeguards in the use of corporal punishment as a disciplinary measure. Among these safeguards, students should be notified of those behaviors that would occasion corporal punishment, written reasons for the punishment should be furnished to parents upon request, and school officials should attempt other disciplinary measures before resort to corporal punishment [Baker v. Owen, 395 F.Supp. 294 (M.D.N.C. 1975), aff'd, 423 U.S. 907 (1975)]. Protections should also include an opportunity for the student to explain his or her version of the event involving misconduct and a right, except in extraordinary circumstances, to have an adult witness the administration of the punishment [Smith v. West Virginia State Bd. of Educ., 295 S.E.2d 680 (W.Va. 1982)].

Factors to be considered in determining whether a school official's use of corporal punishment is reasonable include the age and physical condition of the student, seriousness of the misconduct, motive for administering discipline, nature and severity of the punishment, attitude and past behavior of the student and the availability of less severe but equally effective means of discipline [Roy v. Continental Insurance, 313 So.2d 349 (La.App. 1979)]. The nature and severity of an injury resulting from the administration of corporal punishment is a significant factor in assessing whether the punishment is excessive [Crews v. McQueen, 385 S.E.2d 712 (Ga.App. 1989)]. To counter conflicting allegations about the administration of corporal punishment, school officials should arrange to have witnesses present to observe [See Harrell v. Daniels 499 So.2d 345 (La. App. 1987) (teachers who witnessed the administration of a student's punishment corroborated the conclusion that the punishment was reasonable)].

There are few cases that illustrate a defensible standard of reasonable force applicable to the privilege to defend oneself in a public school setting. Courts have recognized that, in stressful circumstances, a person of ordinary prudence may act with less detachment and control than he or she might under normal circumstances [See Thomas v. Bedford, 389 So.2d 405 (La.App. 1980)]. The use of reasonable bodily restraint on a student is permitted, and the greater the threatened peril, the greater will be the justification for quick and strong reaction. When the student is the aggressor, particularly under circumstances in which the perceived threat is apparent, the actions of school officials in using physical force are often privileged.

In the case on which the hypothetical is loosely based, a student was allegedly injured when the teacher grabbed her arm at the elbow as she exited a classroom at the teacher's command. The teacher acted to avoid a fight between students and restore order. The student sued on grounds of a violation of Fourth Amendment "unreasonable seizures" and Fourteenth Amendment substantive due process. The federal appeals court affirmed summary judgment for the school district. Although the student contended that the teacher's action violated due process because it involved excessive force, this argument was rejected by the court. The reasonableness of the teacher's actions was considered in the context of the school setting in which a student, compelled to attend, loses some liberty from the moment they enter the school. The "seizure" of the student in the face of provocative or disruptive behavior was justified by the circumstances. [Wallace By Wallace v. Batavia School Dist., 68 F.3d 1010 (7th Cir. 1993)].

Scenario Number Four

A school bus driver calls to report to the middle school principal that knife cuts were found on the seats of the bus after the morning drop-off of students. The driver does not recall which students rode in that area of the bus that morning, but suspects that it was a group of boys who were twice directed by the driver to be quiet and remain in their seats. Because it is early in the school year, the driver is unfamiliar with the names of the students. The incident is of particular concern to the principal because during the previous school year there were reports from local community leaders that youth gang activity in the community surrounding the school appeared to be on the rise. The middle school enacted a new, more restrictive dress code during the summer in order to head-off any wearing of gang symbols at school. The situation is further complicated by a change in the middle school's attendance area. The change resulted in the school absorbing additional students from another school which has a reputation for discipline problems, particularly a high incident of student to student violence and instances of drug possession among students. [Refer to Thompson v. Carthage School Dist., 87 F.3d 979 (8th Cir. 1996) for the genesis of this hypothetical.]

4. MAINTENANCE OF APPROPRIATE DISCIPLINE: JUSTIFYING SEARCHES AND REASONABLE SCOPE OF A SEARCH

School officials must have a "reasonable suspicion" in order to search a student. Searches must be justified at inception and reasonable in scope under this standard [New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985)]. It is necessary to evaluate the evidence justifying the search, taking into consideration what is sought, the degree of individualized suspicion and the age, history and background of the student subject to search. When searches involve weapons possession or drug use in public schools, greater discretion is typically allowed school officials.

The closer the search is to the person, the more evidence the school official will need to establish a reasonable basis for a search. Consequently, the student's expectation of privacy in a locker is not as substantial as the privacy associated with an individual's bookbag or purse

[Compare Interest of Isiah B., 500 N.W.2d 637 (Wis. 1993) with Matter of Gregory M., 585 N.Y.S.2d 193 (App.Div. 1992)].

The bookbag or purse does not carry as high an expectation of privacy as would the touching of the student in a patdown [D.I.R. v. State, 683 N.E.2d 251 (Ind.App. 1997)]. However, when school officials can articulate a reasonable apprehension that a student may have a weapon in his or her possession, a patdown can be justified [In the matter of Kevin P., 587 N.Y.S.2d 730 (App. Div. 1992)].

Because strip searches are regarded as highly intrusive, particularly when they involve physical contact or inspection of body cavities, the justification for a strip search must be substantial, approaching the standard of probable cause applicable to law enforcement officials, and the conduct of such a search must be undertaken with care [See Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), cert.denied, 451 U.S. 1022, 101 S.Ct. 3015 (1981); Cales v. Howell Public Schools, 635 F.Supp. 454 (E.D.Mich. 1985); and State ex rel Galford v. Mark Anthony B., 189 W.Va. 538, 433 S.E.2d 41 (1993)]. Increasingly, however, courts are recognizing that both school officials and school resource officers serving in schools can undertake strip searches when evidence points to the possession of weapons or drugs in the school setting [See, e.g. Bridgman v. New Trier High School Dist., No. 203, 128 F.3d 1146 (7th Cir. 1997); In Interest of Angelia D.B., 564 N.W.2d 682 (Wis. 1997); Cornfield v. Consolidated Higher School Dist. No. 130, 991 F.2d 1316 (7th Cir. 1993); Williams by Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991); and Widener v. Frye, 809 F.Supp. 35 (S.D.Ohio 1992)].

Evidence supporting a search should lead to individualized suspicion whenever possible. This means that reliable information enables the school leader to identify the specific individual who is suspected of misconduct. Evidence that a student has violated a school rule is not always sufficient to justify a search. School officials should avoid undertaking searches for unrelated infractions of school policies. When the infraction of a school rule has no relationship to a need for search, additional information is necessary in order to establish reasonable suspicion that would justify a search [See D.I.R. v. State, 683 N.E.2d 251 (Ind.App. 1997) (patdown of student late to school) and Coronado v. State, 835 S.W. 2d 636 (Tex.App. 1992) (automobile search for skipping school)].

Highly intrusive blanket searches of students should be avoided [See Burnham v. West, 681 F.Supp. 1160 (E.D.Va. 1987) and Bellnier v. Lund, 438 F.Supp. 47 (N.D.N.Y. 1977)]. However, when the search process is minimally intrusive, as in the use of sniff dogs to check lockers and automobiles parked on school property, metal detectors to locate weapons, luggage inspections on school sponsored trips, or random urinalysis testing for participation in extracurricular athletic programs, these searches have passed judicial scrutiny. To support these searches, there should be documentation of a history of drug or weapons problems at the school site [Vernonia School Dist. v. Acton, 115 S.Ct. 2386 (1995)]. This documentation, coupled with the broad custodial authority of school leaders for the health and welfare of students, can support the use of blanket searches when concerns for the maintenance of a safe environment for students is paramount [See Todd v. Rush County Schools, 133 F.3d 984 (7th Cir. 1998) (random urinalysis testing of all students engaged in extracurricular activities upheld)]. The use of sniff dogs and metal detectors to detect weapons and drugs has been held permissible as part of a general search policy [See, e.g., In re Latasha W., 70 Cal.Rptr.2d 886 (Cal. App. 1998) (metal detector used to discover knife); State v. J.A. 679 So.2d 316 (Fla.App. 1996) (metal detector followed by pat down and discovery of a handgun); In re S.S., 680 A2d 1172 (Pa.App. 1996) (boxcutter knife discovered during scan of students and pat down of coat); and People v. Pruitt, 662 N.E.2d 549 (Ill.App. 1996) (walk-through detector resulted in pat down and discovery of handgun)].

Scenario Number Five

The middle school principal has noticed that discipline referrals for several of his teachers have dropped significantly. A few students have complained to the principal that these same teachers require students to stay in a "time-out box" for periods of up to twenty minutes. Within the week, two parents have phoned the school to complain that these teachers locked children in a hall bathroom for over an hour because they were late to class. One of the parents also complained that her son reported being forced to remain in a cabinet underneath a laboratory sink for an hour because he had been disruptive in class. When the principal made inquiries by asking a teacher in another classroom what she may have observed, the teacher reluctantly admitted that she has seen one of the teachers confine a student to a chair with strapping tape for over an hour because the student could not keep still. [Refer to Orange v. County of Grundy, 950 F.Supp. 1365 (E.D. Tenn. 1996); Jefferson v. Ysleta Indep. School Dist., 817 F.2d 303 (5th Cir. 1987), Gerks v. Deathe, 832 F.Supp. 1450 (W.D. Okla. 1993) for the genesis of this hypothetical.]

5. SUBSTANTIVE DUE PROCESS: THE RIGHT TO BODILY SECURITY AND UNREASONABLE RESTRAINT

Courts have generally refused to review minor punishments associated with the application of appropriate discipline in the school setting. The range of lesser penalties, such as short-term suspension from school transportation, after school detention, in-school suspension, time-outs, and related penalties seldom invoke judicial concerns about denying an entitlement to an education or stigmatizing the student since these penalties are often regarded as *de minimus* [See Rasmus v. State of Arizona, 939 F.Supp.709 (D.Ariz. 1996) (placement in windowless time out room for ten minutes did not rise to the level of a due process violation)].

Instances of unreasonable restraint, such as tying a child to a chair for a full day and part of a second day, have implicated liberty within the provisions of substantive due process [Jefferson v. Ysleta Indep. School Dist., 817 F.2d 303 (5th Cir. 1987)]. In one instance, a federal court ruled that a jury must decide if a teacher's conduct in confining a mentally handicapped student suffering from cerebral palsy in a school bathroom and compelling the student to clean up excrement involved actions so sever, so disproportionate to the need presented, and so inspired by malice or sadism that it amounted to a violation of substantive due process [Gerks v. Deathe, 832 F.Supp. 1450 (W.D.Okla. 1993)]. Judges have placed a substantial burden on the student-plaintiff to establish legal liability in these cases, requiring proof the school official demonstrated "deliberate indifference" to or "callous disregard" for the student's right to bodily security. In one case, an eighth grade student who was placed in a holding cell for misbehaving while on a class field trip to a detention center was not deprived of due process in that the teacher's actions were de minimus deprivations of liberty that did not implicate liberty or property rights. The student had been warned repeatedly about disruptive conduct on the tour, and was placed in the holding cell in an area where she could be supervised for approximately seven minutes before being released and sent back to the school with a school liaison officer [Harris By Tucker v. County of Forsyth, 921 F.Supp., 325 (M.D.N.C. 1996)].

In several cases involving issues of bodily security, plaintiffs have sought to hold school officials and local districts liable for an employee's physical or sexual abuse of a student [Doe v. Taylor Independent School Dist., 15 F.3d 443 (5th Cir. 1994) (en banc)]. One federal appeals court has held that a school principal's liability for an employee's physical abuse of a student could be established by showing that the principal maintained, "with deliberate indifference to the consequences," a policy, practice or custom that resulted in the denial of a constitutionally protected right [Stoneking v. Bradford Area School Dist. 882 F.2d 720 (3rd Cir. 1989)]. The liability of a principal in this case was largely predicated on allegations that he discouraged students from pursuing complaints of harassment against a teacher, concealed allegations about the teacher's misconduct in a secret file kept at home, forced one student to recant allegations of the teacher's misconduct, and granted excellent evaluations to the teacher despite knowledge of complaints charging the employee with abuse of students [See also Jane Doe v. Board of Educ. of Honoegah Community High School, 883 F.Supp. 1366 (N.D.Ill. 1993); Waechter v. School Dist. No. 14-030, 773 F.Supp. 1005 (W.D. Mich. 1991); and C.M. v. Southeast Delco School Dist., 828 F.Supp. 1179 (E.D.Pa.1993)]. Actual or constructive knowledge of the alleged misconduct has been a critical element in establishing school district liability in these cases, and several courts have found that school officials could not be held liable when they respond immediately to complaints of abuse by undertaking investigation [See, for example, Hagan v. Houston Independent School Dist., 51 F.3d 48 (5th Cir. 1995) and Black by Black v. Indiana Area School Dist., 985 F.2d 707 (3rd Cir. 1993)].

Another basis for the liability of school officials relates to an affirmatively created danger. Under this theory, a school official's knowledge and conduct in affirmatively placing a student in a position of danger, effectively stripping the student of the ability to defend his or herself, or cutting off potential sources of private aid to the student would create liability for injuries the student sustained. [See Mitchell v. Duvall, 107 F.3d 837 (11th Cir. 1997); Johnson v. Dallas Independent School Dist., 38 F.3d 198 (5th Cir. 1994); Dorothy J. v. Little Rock School Dist., 7 F.3d 729 (8th Cir. 1993); and Hunter v. Carbondale Area School Dist., 829 F.Supp. 714 (M.D.Pa. 1993)].

Abuse of a student by other students has only recently been considered by federal courts. A potential bar to liability based on substantive due process in the context of peer sexual harassment or abuse is that there is no constitutional deprivation when peers harass or abuse peers because the perpetrator of the abuse is a private actor rather than a school employee who can be characterized as an agent of the state [See generally, D.R. by L.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3rd Cir. 1992) (en Banc), cert. denied, 113 S.Ct. 1045 (1993); Doe v. Petaluma City School Dist., 830 F.Supp. 1560 (N.D.Cal. 1993); and B.M.H. v. School Bd., 833 F.Supp. 560 (E.D. Va. 1993)]. Nor would Title IX of the Education Amendments of 1972 appear to offer a basis for a claim of peer sexual harassment that could create school district liability [See Rowinsky v. Bryan Independent School Dist., 80 F.3d 1006 (5th Cir. 1996)].

DRESS CODES: A STUDY OF PERCEPTIONS, POLICIES, AND PRECEPTS

A Preliminary Discussion of the Data

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The topic of dress codes has been the subject of lively debate throughout our nation. President Clinton has even joined the dialogue at the national level in his discussion of school uniforms. But, a particular and important voice seems to be missing from the debate about dress codes--the principal of the school.

This preliminary data is part of a random study of principals' perception of the efficacy of dress codes. Not all of the data has been received at the time this document was being prepared for the conference binder. It should be kept in mind that this data represents 55 responses of the 240 random surveys mailed to principals throughout the nation. Therefore, any conclusions drawn from this data set would be highly speculative and inappropriate. We present this preliminary data at this time for those individuals who will not be able to attend our session but would like to have some notion of our research on dress codes. We will send our completed research paper to those individuals who request it (tad@christa.unh.edu).

Format for Paper Presentation

I. Overview of pertinent dress code court cases
Government as sovereign, employer, and educator

II. Presentation of data

III. Discussion of data

IV. Discussion of a proposed standard of review for dress codes

PRELIMINARY DATA

Data responses to specific questions that did not conform to the instrument were omitted.

Demographic Data

Size of School (Student)	
1-250:	10
251-500:	12
501-1,000:	24
1,001-2,000:	8
2,001-3,000:	1

Location of School	
Rural:	33
Suburban:	14
Urban:	7

Gender of Principal	
Female:	13
Male:	31

Experience as a Principal (Years)	
0-1:	3
2-5:	14
6-10:	15
11-15:	13
16+:	10

The survey instrument used a Likert style scale for the first 6 questions. There were two yes/no questions and two open-ended questions. The first 6 questions assessed the principal's perceptions about the use of dress codes as an effective policy. Questions 7, 8, and 9 focused on the policy response to the issue of dress codes. The last question asked the principal to respond to why a dress code is needed or not needed at his or her school. Only the preliminary data from the first seven questions will be presented at this time. The surveys were categorized into three groups; elementary, middle school/junior high school, and high school. The designations were preselected according to Patterson's Educational Directories.

Dress Code Policy Questionnaire

Mean scores

1. I believe that a dress code improves student behavior.

1 Strongly Disagree	2	3	4	5 Strongly Agree

Elementary: 3.93 *Middle School: 4.16* *High School: 3.78* *Total: 4.04*

2. Students do not have a constitutional right to wear clothes of their choice to school.

1 Strongly Disagree	2	3	4	5 Strongly Agree

Elementary: 4.00 *Middle School: 3.35* *High School: 3.89* *Total: 3.61*

3. I believe that a dress code policy prepares students for the realities of the work world once they leave school.

1 Strongly Disagree	2	3	4	5 Strongly Agree

Elementary: 3.93 *Middle School: 3.88* *High School: 4.11* *Total: 3.93*

4. I believe that dress codes are worth the trouble of enforcing.

1 Strongly Disagree	2	3	4	5 Strongly Agree

Elementary: 3.93 *Middle School: 4.03* *High School: 4.33* *Total: 4.05*

5. I believe that dress codes reduce student-to-student sexual harassment.

1 Strongly Disagree	2	3	4	5 Strongly Agree

Elementary: 3.71 *Middle School: 3.78* *High School: 3.67* *Total: 3.75*

6. I support the implementation of a mandatory school uniform policy.

1 Strongly Disagree	2	3	4	5 Strongly Agree

Elementary: 3.07 *Middle School: 3.65* *High School: 3.44* *Total: 3.46*

7. Of the 55 respondents, 12 (22%) have dress codes .

Discussion

Discussions of preliminary data are always approached with trepidation and are always tentative. It will be interesting to note if some of the trends at this point hold true at the conclusion of the study. Another word of caution regarding the data presented is important. The responses from the three categories--elementary, middle school, and high school--are not evenly distributed. There were 14 elementary school principal responses, 32 middle school responses, and 9 high school responses.

The questions were worded so that those respondents that have a favorable perception of dress codes will mark their responses with a higher number. The first five questions are a subset of dress code questions and question number 6 is a related question on mandatory school uniforms. For questions 1 through 5, the elementary school principals mean score was 3.90, middle school principals was 3.84, and high school principals was 3.96, not much variation between the groups. Question number 6 asked if the principal would support the implementation of a mandatory uniform policy. The mean scores for all three groups were lower for this question than for the other five questions (3.07, 3.65, 3.44 respectively, and a mean total of 3.46). It would appear that principals have less support for uniforms than dress codes, but solid support for both policy initiatives is in evidence.

We look forward to receiving the rest of the responses and analyzing them along with the other questions not discussed in this preliminary report.

TEXAS SCHOOL ADMINISTRATORS' LEGAL DIGEST™

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STUDENT DRESS AND GROOMING REGULATIONS IN THE PUBLIC SCHOOLS: A LEGAL OVERVIEW

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Public schools are charged with a very important mission: Teaching our young people how to read, write, think, add, subtract, and pass the TAAS test. Teaching good citizenship and preparing students for the workplace are also considered responsibilities of the schools. Duties that traditionally have been performed by the family have, over the years, gradually shifted to the schools. Schools now feed and transport students, provide medical care, and punish students for misdeeds both on and off campus. Even sex education, once exclusively the realm of the parents, is now a task accepted by the schools.

Given this trend, it is not surprising that public schools are now more involved in controlling the clothing and hairstyles worn by students. School districts now see fit to dictate the length of skirts, the bagginess of pants, and the length of a student's hair. Some public schools even require students to wear uniforms. What about a student's rights? Have schools gone too far?

If everyone in a community shared the same values, then dress and grooming codes would simply be a reflection of those values, and there would be no opposition. Many communities in Texas, however, are becoming increasingly more diverse. Some rural communities are becoming suburbs as a result of urban sprawl, and many are experiencing an influx of former city dwellers seeking to find the "good life." When a school dress or grooming code collides with the values of an individual parent or student, the potential for conflict arises. Parents and students who believe that schools have overstepped their authority have challenged student dress and grooming codes with varying success.

This article will examine legal challenges to student dress and grooming codes, including challenges based on gender discrimination and rights to freedom of speech and religion. School uniform policies and regulations prohibiting "gang-related apparel" also will be addressed. The article will provide guidance regarding the limits on a school district's authority to regulate dress and grooming and will identify the types of regulations which, if challenged, are likely to be struck down by the courts.

HAIR TODAY, GONE TOMORROW — REGULATING HAIR LENGTH AND STYLE

Hair is important. Untold millions of dollars are spent by those wishing to avert the loss of hair, that dreaded affliction of baldness. Hair, especially long hair, also is an important element in many of our popular myths, legends, and stories. When Delilah relieved Sampson of his long locks, she sapped his strength and made him vulnerable. In the popular Christmas story, *The Gift of the Magi*, a wife sells her most prized possession, her beautiful long hair, to pur-

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chase a gift for her husband. And where would Rapunzel be if she were not able to "let down her long hair." Even the New Testament to the Bible weighs in on the subject:

> Does not nature itself teach you that for a man to wear his hair long is degrading, but for a woman to wear her hair long, it is a glory to her . . . ?[1]

For years, school districts have sought to regulate the length of their male students' hair. These attempts have met with litigation in courts all across the country, and the rights of schools to regulate hair length vary depending on the jurisdiction. Whether a student has a right to wear his hair long depends on where he lives. In many states, federal courts generally have held that rules regulating the hair length of public school students violate the students' rights of free expression, liberty, and/or privacy. In Texas, however, the Fifth Circuit Court of Appeals (the federal court of appeals with jurisdiction over Texas) has upheld the right of schools to enforce regulations regarding hair length, as have the Sixth, Ninth, Tenth, and Eleventh Circuits.

A dispute which began in 1970 brought us *Karr v. Schmidt,*[2] in which Chesley Karr, then a sixteen-year-old male student at El Paso Coronado High School, attempted to enroll for his junior year but was refused. His hair violated the district's grooming policy for boys, which stated in part:

> Hair may be blocked, but is not to hang over the ears or the top of the collar of a standard dress shirt and must not obstruct vision. No artificial means to conceal the length of the hair is to be permitted; i.e., ponytails, buns, combs, wigs, or straps.[3]

Karr claimed that the policy violated his due process and equal protection rights. The Fifth Circuit found that the right to wear hair as one pleases does not rise to the level of constitutional protection and that any loss of liberty is rather inconsequential. The court observed that the regulation in question left students a rather wide range of personal choices in their dress and grooming, reasoning that the hair length regulation would not lead to "a nation bent on turning out robots . . . insisting that every male have a crew cut and every female wear pigtails."[4] In an attempt to stem the tide of what it called "the multitude of lawsuits which have recently inundated the federal courts attacking hair length regulations," the court stated:

> [T]here is no substantial constitutional right to wear hair in the fashion that suits the wearer. . . . In such cases, the appropriate standard of review is simply one of whether the regulation is reasonably intended to accomplish a constitutionally permissible state objective.[5]

The court further pronounced:

> [W]e think it proper to announce a per se rule that such regulations are constitutionally valid. Henceforth, district courts need not hold an evidentiary hearing in cases of this nature. Where a complaint merely alleges the constitutional invalidity of a high school hair and grooming regulation, the district courts are directed to grant an immediate motion to dismiss for failure to state a claim for which relief can be granted.[6]

In another federal case, *Ferrell v. Dallas ISD*, the Fifth Circuit held that "the prohibition of 'Beatle' type hair cuts for males did not violate the First or Fifth Amendments as applied to the states under the Fourteenth Amendment."[7]

In a state court case in 1976, a Houston Court of Appeals refused to interfere in a grooming controversy, upholding a rule against boys having hair length beyond the bottom of a shirt collar, in *Mercer v. Board of Trustees of North Forest ISD*.[8] In *Mercer*, the student claimed that different grooming rules for males and females violated the Equal Rights Amendment (ERA) of the Texas Constitution, which states that "[e]quality under the law shall not be denied or abridged because of sex . . . ."[9] The *Mercer* court observed that there are some exceptions to the ERA's prohibition of sex discrimination. A classification based on sex can be justified by (1) physical characteristics, (2) other constitutionally protected rights such as the right of privacy, or (3) other "compelling reasons." The court stated, "For us to adjudicate that women are men would be as futile as it would be absurd."[10] The *Mercer* court noted that school aged children "are in a formative period of their lives wherein their values are being established by parents, church, and school. All may reasonably establish rules of conduct arising out of the relationship without intervention of the courts."[11]

In *Karr v. Schmidt* and *Mercer v. Board of Trustees of North Forest ISD*, both cases from the 1970s, the courts found that schools lawfully could enforce codes regulating hair length. The story does not end there, though. Since the Fifth Circuit in *Karr v. Schmidt* ruled that hair codes did not violate the U.S. Constitution, students again began to look to state law in their attempt to invalidate hair length regulations. The 1990's brought us two challenges to student hair codes, based on state gender discrimination laws which ultimately were decided by the Texas Supreme Court.

The Bastrop ISD board of trustees implemented a student dress code for the 1991-92 school year that included the regulation of male students' hair length:

> The rear length must be no longer than to the bottom of a regular shirt collar. On the sides, the bottom

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of the earlobes must be visible. In front, the length cannot be longer than the top of the eyebrows.

The hair-length restriction in the dress code applied only to boys. During the 1991-92 school year, Zachariah Toungate was a third-grade student in Bastrop. His hair extended in back five to six inches below his shirt collar, in a style described as a "rat-tail." The Toungates refused to cut or trim their son's hair to comply with the district's newly established dress code. Because of his defiance of the dress code, Toungate was removed from his regular classroom and taught in the district's alternative education program, separated from his regular classmates. His parents were informed that he could return to his regular classroom as soon as his hairstyle complied with the district's hair-length regulation. The Toungates refused, and after approximately four months, Toungate withdrew from school after first filing suit against the district. In his suit, Toungate claimed that the hair length rule discriminated against him because of his sex and violated his rights under (1) the Equal Rights Amendment to the Texas Constitution, and (2) Chapter 106 of the Texas Civil Practices and Remedies Code.

In concluding that the grooming code did not discriminate on the basis of sex, the Texas Supreme Court held that:

> Hair-length regulations in schools . . . do not elevate the status of one sex over another or deny educational opportunity "because of sex" any more than an employer's imposition of grooming requirements would foreclose opportunities "because of sex."[12]

The Supreme Court did find that when grooming or dress requirements differentiate between men and women and the consequence of the requirements is obviously stigmatizing, the requirement could be discriminatory. To illustrate this point, the Court used an example of an employer's dress requirement that women wear uniforms while men were free to wear business attire. Although dress codes thus sometimes can discriminate because of sex, the Court held that Bastrop's did not.

Prior to the decision in *Bastrop*, the Texas Supreme Court also had issued its ruling in *Barber v. Colorado ISD.*[13] The facts in *Barber* were remarkably similar to those in *Bastrop*. *Barber* involved a school hair-length regulation that was challenged under the Texas ERA by a male student. In that decision, the Texas Supreme Court affirmed the decision of the Court of Appeals and held that "Barber's claims do not manifest such an affront to his constitutional rights as to merit our intervention in this case."[14] In so holding, the Texas Supreme Court adopted that same position as the Fifth Circuit had adopted in 1972:

> It is a matter of common sense that the state judiciary is less competent to deal with students' hair length than a parent, school board, administrator, principal, or teacher. A similar case arose more than twenty years ago in El Paso, Texas, and the Fifth Circuit drew a similar conclusion with regard to the federal judiciary. . . .

Thus, it appears well settled, at least for now, that school districts in Texas can enforce student hair length regulations. Students claiming gender discrimination, personal preference of long hair, or the right of free expression through hairstyle likely will fail in legal challenges to the regulations. Students with bona fide religious objections to hair length regulations, on the other hand, could be successful in challenging a regulation that infringes on their right to the free exercise of religion. Challenges to dress and grooming regulations based on religion are discussed below.

IS THAT A FASHION STATEMENT OR A POLITICAL STATEMENT? STUDENTS' RIGHTS TO ENGAGE IN POLITICAL SPEECH OR EXPRESSION

The First Amendment to the U.S. Constitution guarantees all citizens freedom of speech and expression. While students do not "shed their constitutional rights at the schoolhouse gate," the right to free speech in the public schools is not absolute. Schools have the right to regulate student speech in school newspapers as long as they haven't made the newspaper a public forum,[15] and to prohibit obscene or inappropriate speech.[16] When public schools seek to regulate or censor student speech or expression, courts will examine the reasons for the school's stated interest for the regulation and balance it against the student's right to freedom of expression at school.

The landmark case on this subject is *Tinker v. Des Moines Independent Community School District.*[17] In *Tinker*, three students were suspended from school for wearing black armbands to school in protest of the Viet Nam War. The United States Supreme Court held that, in that instance, the wearing of armbands was political expression and therefore protected activity under the First Amendment. In its opinion, the high court distinguished the wearing of armbands from hair and grooming regulations, the latter of which the Supreme Court implied was not protected by the First Amendment.[18] The Court noted that there was no finding that allowing students to wear the black armbands would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[19] It would follow that if a court found that a certain form of expressive conduct would cause a substantial disruption at school, then a restriction of that conduct imposed by the school district would be allowed.

Such was the case in two opinions in which schools sought to restrict the wearing or displaying of the Confederate Battle Flag. In *Augustus v. School Board of Escambia County, Florida,*[20] a federal trial court overseeing the desegregation of the school district entered an injunction against the use of the Confederate Battle Flag and the use of the name "Rebels" in connection with the school's athletic teams and other extracurricular activities. The court noted that there had been numerous instances of large scale interracial fighting, which twice had resulted in the school's closing. The court of appeals modified the injunction but affirmed the right of the court to restrict the symbolic expression, citing the violence and disruption that had arisen from racial tensions.

In *Melton v. Young*,[21] a high school in Chattanooga, Tennessee had been experiencing serious racial tensions during the 1969-1970 school year, which led to the need for a city-wide curfew for four consecutive nights. The district banned the use of the Confederate flag as a symbol for any public school in Chattanooga and banned the use of "provocative" symbols on clothing.[22] A student was suspended for wearing a Confederate flag patch on his jacket. The court of appeals held that, given the tense racial situation, the school district had the right to restrict the wearing of the symbol.

A school district that cannot prove disruption or some other compelling reason for restriction of politically expressive conduct or dress may have its regulation struck down by the courts. Such was the case in *Chandler v. McMinnville School District*.[23] In *Chandler*, the teachers of the school district were on strike, and the district had hired replacement teachers. Two students, whose parents were striking teachers, attended school wearing buttons and stickers with various slogans, including "I'm not listening scab," "Do scabs bleed?," "Scab we will never forget," and "We want our real teachers back." The students were disciplined and forced to remove the buttons with the word "scab," based on the principal's determination that the word was inherently disruptive. However, the school district had not shown actual disruption, and the court found that the buttons "were displayed in a manner commonly used to convey silently an idea, message, or political opinion to the community."[24] The court ruled that the school district was not justified in squelching the student expression.

For an element of dress or grooming to rise to the level of First Amendment free speech protection, the student must establish (1) that it is intended to express a particular idea, and (2) that it is reasonably identifiable by observers as expressive activity.[25] In *Tinker*, the black armbands were intentional and recognizable symbols of opposition to a war. If a student's objection to a dress or grooming regulation is based merely on personal preference or style, then a challenge to invalidate the regulation based on freedom of speech or expression likely will not succeed. A student who conveys a political message through dress or grooming, however, may enjoy First Amendment protection if the expression is not vulgar or otherwise inappropriate and does not cause substantial disruption.

REBELS WITHOUT A CAUSE — RESTRICTING INAPPROPRIATE MESSAGES ON T-SHIRTS

In the good old days, T-shirts were white and had no words, pictures, or symbols on them. Now, T-shirts contain all sorts of messages. As discussed above, courts have granted some protection to students whose clothing conveys a political message, provided that the expression is not unduly disruptive to the educational process. The right to freedom of speech enjoys special protection when a political message is involved. Courts are more likely to allow school-imposed restrictions on non-political speech or expression, especially if the speech or expression is defamatory, obscene, or otherwise inappropriate for the school environment.

Lewd, vulgar, or offensive messages may be restricted by schools. Federal courts in other jurisdictions have allowed such restrictions in cases in which students wore shirts with the words "Drugs Suck,"[26] "See Dick drink. See Dick drive. Don't be a Dick,"[27] and "Coed Naked Band. Do It To the Rhythm."[28]

School districts generally may restrict students' wearing of T-shirts with messages that advertise, depict, or promote tobacco, alcoholic beverages, drugs, or other substances prohibited by a school district. School districts are seen to have a legitimate interest in restricting the promotion of prohibited substances, thus student challenges to this type of regulation based on free speech concerns largely have been unsuccessful. In one case involving such a regulation, however, students succeeded in challenging the application of the district's regulation to their shirts. A student-designed T-shirt contained the words "The Best Of The Night's Adventures Are Reserved For People With Nothing Planned." This slogan had been used to advertise Bacardi rum and although the T-shirts did not depict or directly refer to alcohol, the school district prohibited the shirts. A federal court in Oklahoma upheld the dress code in general, but found that the school district had not shown that these particular shirts depicted or advertised alcohol or had caused any disruption. The school district was unable to establish that students knew that the slogan was associated with an alcoholic beverage.[29]

Restriction of a defamatory message, i.e., one that is false and injures an individual's reputation or good name, has been upheld by a federal court in another jurisdiction and likely would be upheld in Texas courts. In that case, a student designed and sought to wear a T-shirt depicting drunken school administrators and the words "It doesn't get any better than this." The T-shirt was to be sold to other students during homecoming week.[30] The court found that:

> ". . . the T-shirt — which is clearly offensive — cannot be tolerated. . . . The Administrators are role models, as stated by the United States Supreme Court, and their position would be severely compromised if this T-shirt was circulated among the students."[31]

At least one court has held that free expression rights may not extend to the elementary school level. In that case, a principal prevented students from wearing to school T-shirts with the slogans "Unfair Grades," "Racism, " and "I Hate Lost Creek."[32] The federal appeals court (from another jurisdiction) held that the student did not have a clearly established right to wear the shirts and that ". . . age *is* a relevant factor in assessing *the extent* of a student's free speech rights in school . . ."[33] Thus, school districts possess considerable freedom in restricting inappropriate messages on T-shirts.

GO AND SIN NO MORE — RELIGIOUS EXEMPTIONS FROM STUDENT DRESS AND GROOMING CODES

The United States Constitution prohibits school districts and other governmental entities from impeding or restricting an individual's free exercise of religion.[34] What if a school dress or grooming code is at odds with a sincerely held religious tenet or belief? Must a school district make an allowance or exception in such a situation?

This issue has arisen in a number of cases. Courts have attempted to balance the school's interest in enforcing the dress or grooming regulation against a student's interest in the religious practice that conflicts with the dress or grooming code. As a general rule, schools must be able to articulate a solid justification for the regulation in order to withstand a challenge on religious grounds. The issue arose in Texas when the Alabama and Coushatta Tribes of Texas, a confederation of Native American tribes, sued the Big Sandy Independent School District.[35] The district had adopted a grooming policy that restricted the hair length of all male students, stating in part:

> Boys' hair should be of a reasonable length and style so as not [to] interfere with the instructional program. Boys' hair should [be] no longer than the top of a standard dress collar.

The federal trial court found that the hair code did not appear to have been enacted for any discriminatory purpose, but rather:

> a. To create an atmosphere conducive to learning and to minimize disruptions attributable to personal appearance, conduct, grooming and hygiene, and attire;
>
> b. To foster an attitude of respect for authority, and to prepare students to enter the workplace, which often has rules regarding dress, conduct and appearance; [and]
>
> c. To ensure that the conduct and grooming of students who represent the District in extracurricular activities create a favorable impression for the District and the community.[36]

The school district placed Native American students in in-school detention for violating the hair policy. The students argued that the policy violated their sincerely held religious beliefs. The tribe did not require the male students to wear their hair long, but it did approve of the practice, noting the religious and cultural significance of the practice. The court held that the school district's policy and practice violated the students' sincerely held religious beliefs and their right to expression of their tribal heritage and traditions. The court entered a preliminary injunction preventing the school district from enforcing the hair regulation against Native American students.

The school district appealed, and the court of appeals sent the case back to the trial court for further consideration. The parties then settled the dispute when the school district allowed students to be exempted from the policy by signing a form stating that their long hair was attributable to religious belief or expression.

A different result was reached by a federal appeals court with jurisdiction in Oklahoma. As in the *Alabama and Coushatta* case, Native American students objected to a hair length regulation for male students based on interference with religious and cultural practices. In *New Rider v. Board of Education of ISD No. 1, Pawnee County, Oklahoma,*[37] the court held that "[c]onstitutional rights, including First Amendment rights, are not absolutes."[38] The court held that the regulation did not violate the students' right to exercise their fundamental constitutional rights or liberties. The differing results in the above two decisions illustrate the uncertainty in this area of the law. Courts will focus on the purpose of the regulation in question and on the impact on student religious freedoms or religious expression. Different courts may assign different weights to the interests of the school districts versus the interests of students, leading to varying results.

Courts engage in the same balancing act when the rationale for the dress or grooming code is safety and a student requests an exemption based on religious beliefs. When three students of the Khalsa Sikh faith asserted the right to wear a ceremonial knife to school, the Livingston Union School District in California refused to allow the children to do so. In that case, entitled *Cheema v. Thompson,*[39] the school district claimed that both school district policy and California state law prohibited the students from carrying knives on campus. A central tenet of the Khalsa Sikh religion requires them to wear at all times five symbols of their faith: "kes" (long hair); "kangha" (comb); "kachch" (sacred underwear); "kara" (steel bracelet); and "kirpan" (ceremonial knife). The court held that the regulation placed a substantial burden on the students' exercise of religion and upheld an imposed compromise plan whereby the students could carry the ceremonial knives, if they were sewn tightly to their sheaths, had a dull blade, and were worn under the students' clothing so that they were not readily visible.[40]

What is the result when athletic dress codes, motivated by safety, clash with religious practices? The Illinois High School Association (I.H.S.A.), the organization which governs and coordinates virtually all of the state's interscholastic athletic competition, had a rule forbidding basketball players from wearing hats or other headwear while playing. The sole exceptions were for eyeglasses and headbands no wider than two inches. Two orthodox Jewish high schools, their basketball players, and the players' parents sued the I.H.S.A, claiming that the regulation conflicted with the requirement that orthodox Jewish males cover their heads at all times except when they are (a) unconscious, (b) immersed in water, or (c) in imminent danger of loss of life. The basketball players had been wearing yarmulkes (small skull caps that cover the crown of the head) fastened to the hair with bobby pins during competition. The I.H.S.A. interpreted its rule to prohibit the wearing of yarmulkes during play, claiming that the rule's purpose was to promote safety and that, even when fastened to the head with bobby pins, the yarmulkes often fell off during play.

In that case, the court found both a legitimate safety concern (headwear falling off and causing a risk of injury from a player slipping on the headwear) and a legitimate religious practice (the requirement for orthodox Jews to cover their heads with the yarmulkes). The court of appeals found that the I.H.S.A. regulation did not violate the free exercise of religion clause of the First Amendment but ordered the trial court to retain jurisdiction of the case so the basketball players could have the opportunity to propose a form of secured head covering that complied with Jewish law and eliminated the safety concerns of the I.H.S.A. In short, the court urged compromise.

Courts tend to give strong consideration to sincerely held religious practices and beliefs of individuals. When a school dress or grooming regulation tends to infringe on or interfere with a student's religious practice or belief, courts will weigh the school's interest in enforcing the regulation against the burden on the individual resulting from strict enforcement. It is a wise practice to seek compromise in such situations, as litigation can be costly and unpredictable.

FROM *WEST SIDE STORY* TO *BOYZ IN THE 'HOOD* — SCHOOL DISTRICT REGULATIONS RESTRICTING "GANG-RELATED APPAREL"

Disruption and violence associated with street gangs in public schools is a growing problem across the nation. The issue, once confined to inner-city schools, increasingly is encountered in schools in rural and suburban communities. To discourage gang activity, many school districts have designed dress codes that attempt to forbid clothing identifiable as "gang-related." Law enforcement officials have assisted schools in identifying certain symbols and patterns of dress that have been associated with identified gangs. Forbidden gang attire may include certain jewelry, bandanas, baggy or sagging pants, baseball caps worn in a particular manner, shoelaces of specific colors, insignia from various collegiate or professional sports teams, and other items.

Several federal courts have allowed schools to restrict clothing and styles of dress associated with gangs. Federal courts in other jurisdictions have upheld school anti-gang regulations prohibiting earrings,[41] sagging pants,[42] and "clothing [with] pictures or any other insignia which identifies any professional sports team [or] college. . . ."[43] Schools with actual gang problems are more likely to have restrictive anti-gang dress codes upheld by the courts. If a school cannot prove "actual or threatened disruption or material interference with school activities," courts may strike down a dress code as an unreasonable or unjustified restriction,[44] or could limit application of the dress code to campuses with identified gang problems.[45]

Some anti-gang dress codes seek to prohibit any element of dress that could be shown to be associated with a gang, leaving discretion to the campus principal or other administrator. A policy that simply prohibits "gang-related apparel," without clearly defining what the school considers to be gang-related apparel, could be struck down for vagueness.

For example, in *Chalifoux v. New Caney ISD*,[46] two students in a Texas school district wore rosaries around their necks at school. The students were informed that the rosaries were considered "gang-related apparel" and that the rosaries could only be worn out of view, i.e., under the shirt. The district had information regarding the association of the wearing of the rosary around the neck and the Houston-area gang known as the Southwest Cholos. The school district argued that the wearing of the rosary was insufficiently communicative to merit First Amendment protection— that most kids wouldn't know what the intended message was. But the court pointed to the crucifix at the center of the rosary, a universal symbol that most people would recognize, and held that the regulation violated the students' rights to freedom of speech and free exercise of religion. The court further held that the regulation prohibiting "gang-related apparel" was void because it was too vague to inform the students of what type of apparel was prohibited. The student handbook defined "gang-related apparel" as "[a]ny attire which identifies students as a group (gang-related)."

Other school districts have seen their anti-gang policies struck down for vagueness as well. The Davenport (Iowa) Community School District adopted a policy in 1992 stating that:

> "[g]ang related activities such as display of 'colors,' symbols, signals, signs, etc. will not be tolerated on school grounds. Students in violation will be suspended from school and/or recommended to the Board for expulsion."

Brianna Stephenson was a student who had a small tattoo of a cross between her thumb and index finger. After being informed that the tattoo violated the anti-gang symbol policy, and being warned that she would be subject to discipline if the tattoo was not altered or removed, Stephenson underwent laser surgery to have the tattoo removed. She then sued the school district, claiming that the policy prohibiting gang symbols was unconstitutional because it was vague and overbroad.[47] The court agreed that the policy was "fatally vague . . . [and] allows school administrators unfettered discretion to decide what represents a gang symbol."[48]

School administrators attempting to define "gang-related apparel" have a difficult task. Gang members may attempt to change identifying apparel or insignia to stay one step ahead of the regulations and may adopt more subtle means of gang identification. Anti-gang dress and grooming regulations likely will be found permissible if the regulations are (1) clear enough to put students on notice of what is prohibited; (2) enacted in response to an "actual or threatened disruption or material interference with school activities"; and (3) narrowly tailored to address the identified problem without unreasonably restricting student rights.

SCHOOL UNIFORMS — THEY AREN'T JUST FOR PRIVATE SCHOOLS ANYMORE

Once reserved for private schools, school uniforms are now finding their way into the public schools of the nation. School districts in Chicago, Baltimore, and Phoenix require students at selected schools to wear uniforms. The Long Beach (California) Unified School District requires students in kindergarten through ninth grade to wear uniforms and reports that 65,000 of the district's 86,000 students wear them. Advocates of uniforms for public school students contend that uniforms may help improve discipline and attendance and further assist in maintaining an emphasis on learning.[49]

School boards now have specific authority to require students to wear uniforms in Texas public schools. The law, added as a part of the overhaul of the Education Code in 1995, states:

> (a) The board of trustees of an independent school district may adopt rules that require students at a school in the district to wear school uniforms if the board determines that the requirement would improve the learning environment at the school.
>
> (b) The rules the board of trustees adopts must designate a source of funding that shall be used in providing uniforms for students at the school who are educationally disadvantaged.
>
> (c) A parent or guardian of a student assigned to attend a school at which students are required to wear school uniforms may choose for the student to be exempted from the requirement or to transfer to a

school at which students are not required to wear uniforms and at which space is available if the parent or guardian provides a written statement that, as determined by the board of trustees, states a bona fide religious or philosophical objection to the requirement.

(d) Students at a school at which uniforms are required shall wear the uniforms beginning on the 90th day after the date on which the board of trustees adopts the rules that require the uniforms.[50]

The San Antonio Independent School District voted in December, 1997, to require uniforms for all 60,000-plus students on all campuses. The required uniform will consist of a white shirt and khaki pants, skirts, or shorts.[51] Selected schools in other districts also have required uniforms.

The Texas law allowing school districts to require uniforms has not been challenged in a reported decision. School uniform policies from school districts in other states have survived legal challenges. In Phoenix, students who attended the Phoenix Preparatory Academy, a public, inner-city magnet school, were required to wear uniforms "with no logos of any kind." Students who objected to the policy had the option of attending another school within the district without a uniform policy. Two students wore shirts with patriotic and religious messages and were involuntarily transferred to other schools for violation of the uniform policy. The students sued the district in Arizona state court, alleging a violation of their First Amendment rights to freedom of expression.[52] The court held that the dress code was content-neutral, i.e., it did not discriminate against any particular viewpoint or type of expression, and that the dress code was constitutional.

The Calumet City (Illinois) School District, citing gang problems, adopted a student uniform policy requiring white tops and blue pants or skirts. A parent of a student objected and sued the school district in federal court, arguing that parents have the right, based on the Bible, to teach values to their children and that the uniform policy infringed on that right.[53] The court ruled in favor of the school district, holding that the uniform rule did not substantially burden the parents' free exercise of religion.

Given the specific authority granted by the Texas Education Code, Texas school districts may adopt uniform policies for individual campuses or for the entire district. A uniform policy must provide a funding source for assisting those who may not be able to afford the uniforms. Further, a uniform policy must allow for exemptions or transfers to another campus without a uniform requirement if the parent provides a written statement that articulates a "bona fide religious or philosophical objection to the requirement."

DRESSING FOR THE OCCASION — REGULATING STUDENT ATTIRE AT SPECIAL EVENTS

A number of judicial decisions have examined a school district's authority to regulate dress and grooming at school-sponsored or school-related events, such as graduation exercises and school dances. When Warren and Florence Harper, a brother and sister, showed up to the 1985 Edgewood (Ohio) High School Junior-Senior Prom, they stood out from the crowd. Warren was dressed as a woman, wearing earrings, stockings, high heels, a dress, and a fur cape. Florence, his sister, wore a black tuxedo and men's shoes. The students were forced to leave after refusing to change their clothes. The school district had a policy requiring students to dress in conformity with the accepted standards of the community. The Harpers sued in federal court, alleging gender discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The court granted summary judgment in favor of the school district, stating, "the school board's dress regulations are reasonably related to the valid educational purposes of teaching community values and maintaining school discipline."[54]

A North Carolina school district had notified students in writing to wear "dress pants as opposed to jeans" at the graduation ceremony. When a student arrived at the ceremony in "brushed denim pants purchased at substantial cost," the student was not allowed to participate. The student's parents sued the school district. The court found for the school district and upheld the regulation concerning student attire at graduation.[55] Thus, school districts appear to have considerable discretion to regulate students' attire at school events, as long as those regulations are reasonable.

HOW TO CREATE AND ENFORCE A LEGALLY SOUND DRESS AND GROOMING POLICY

The legal system is inherently unpredictable. A jury of twelve may dictate whether a school's policy stands or falls. Two judges may come to two different conclusions as to what is permissible under the law. Legislatures change laws, courts overrule existing precedents, and lawyers stay busy. Given the unstable and fickle nature of the law, how can schools create and enforce dress and grooming policies that are likely to withstand legal challenges?

The first consideration in creating a dress and grooming policy should be defining the rationale or purpose of the policy. Preparing students for employment, teaching the importance of rules and discipline, and minimizing disruptions are examples of stated purposes for dress and grooming policies that courts have upheld. Some rationales are obvious, such as the one for bans on depictions of alcohol, tobacco or drugs on clothing—schools do not want to promote prohibited substances. Are we trying to curtail gang activity? Before we adopt sweeping and restrictive regulations, can we show a history of gang-related violence or disruptions on campus? A policy that has a sound rationale, such as one based on safety, reducing disruption, or other legitimate objective, meets the first prerequisite to surviving a legal challenge.

Next, a policy should be crafted so that it does not excessively inhibit students' rights to the free exercise of religion or freedom of speech, especially speech on political issues or matters of public concern. Both of these rights are guaranteed by the First Amendment to the U.S. Constitution. While students' rights in these areas are not absolute, courts will balance the students' interests with the school district's stated purpose for the regulations. Before silencing political or religious expression through enforcement of a dress or grooming code, a school district should attempt to weigh its interests against those of the student. As discussed above, courts often will find that a student's right to expression outweighs the school district's interest in enforcing its code.

Policies that are vague or overbroad also may be invalidated by the courts. A policy is unconstitutionally "vague" if it is not clear enough to put students on notice of what is prohibited. Examples are policies that prohibit all "gang-related apparel" without defining the term or that prohibit "any clothing which is inappropriate in the judgment of the principal." Unconstitutionally vague policies give almost unlimited powers to those who interpret and enforce the policies. A policy that is more restrictive than necessary to meet the school district's stated purpose for the policy and that infringes on a student's rights in some way may be held by a court to be "overbroad" and, therefore, illegal. Policies must be specific as to what exactly is prohibited and narrowly tailored to meet the stated purpose of the policy in order to survive challenges for being vague or overbroad.

Finally, dress and grooming regulations should be equally enforced. A school district that enforces its dress code against some, but not all, students may face liability based on the selective enforcement. If a student can demonstrate a pattern of differential treatment based on race, for example, a court may invalidate the school district's policy. While a school district may adopt different rules for male and female students, or different rules for different campuses, dress and grooming regulations should be applied evenly to similarly situated students, i.e., those of the same gender on the same campus. Schools may, however, allow a variance for a student with a bona fide religious objection to the policy.

CONCLUSION

Dress and grooming regulations are credited by many educators with imparting order, discipline, positive attitudes, and a sense of community on campus. It appears that the trend toward regulating student dress and grooming is on the rise. When dealing with these issues in the public schools, be mindful that even though courts have approved the use of dress and grooming regulations in public schools, school districts must recognize the constitutional limitations.

ENDNOTES

1. Corinthians 11:14-15 *The Holy Bible, New Catholic Edition.*
2. *Karr v. Schmidt,* 460 F.2d 609 (5th Cir. 1972) (en banc), *cert. denied,* 93 S. Ct. 307 (1972).
3. *Karr,* 460 F.2d at 611 (fn. 1).
4. *Id.* at 615.
5. *Id.* at 616.
6. *Id.* at 617-618.
7. *Ferrell v. Dallas ISD,* 392 F.2d 697 (5th Cir. 1968), *cert. denied,* 89 S. Ct. 98.
8. *Mercer v. Board of Trustees of North Forest ISD,* 538 S.W.2d 201 (Tex. Civ. App. — Houston 1976, writ ref'd, n.r.e.).
9. Tex. Const., Art. I, Sec. 3a.
10. *Mercer* at 206.
11. *Id.*
12. *Board of Trustees of Bastrop ISD v. Toungate,* 41 Tx. S. Ct. J. 46 (Oct. 23, 1997).
13. *Barber v. Colorado ISD,* 901 S.W.2d 447 (Tex. 1995).
14. *Id.* at 450.
15. *Hazelwood School District v. Kuhlmeier,* 108 S. Ct. 562 (1988).
16. *Bethel v. Fraser,* 106 S. Ct. 3159 (1986).
17. *Tinker v. Des Moines Indep. Community School Dist.,* 89 S. Ct. 733 (1969).
18. *Id.* at 737.
19. *Id. at 738.*
20. *Augustus v. School Board of Escambia County, Florida,* 507 F.2d 152 (5th Cir. 1975).
21. *Melton v. Young,* 465 F.2d 1332 (6th Cir. 1972).
22. *Id.* at 1333 (fn. 2).
23. *Chandler v. McMinnville School Dist.,* 978 F.2d 524 (9th Cir. 1992).
24. *Id.* at 530.
25. *See, e.g., Jackson v. Dorrier,* 424 F.2d 213 (6th Cir. 1970); *Olesen v. Bd. of Educ. of School Dist. No. 228,* 676 F. Supp. 820 (N.D. Ill. 1987).
26. *Broussard v. School Board of the City of Norfolk,* 801 F. Supp. 1526 (E.D. Va. 1992).
27. *Pyle v. South,* 861 F. Supp. 157 (D. Mass. 1994), *modified,* 55 F.3d 20 (1st Cir. 1995).
28. *Id.*
29. *McIntire v. Bethel School, ISD No. 3,* 804 F. Supp. 1415 (W.D. Okla. 1992).
30. *Gano v. School Dist. 411 of Twin Falls City, Idaho,* 674 F.Supp. 796 (D. Idaho 1987).
31. *Id.* at 798.
32. *Baxter v. Vigo County School Corp.,* 26 F.3d 728 (7th Cir. 1994).
33. *Id.* at 738.
34. U. S. Constitution, Amendments 1, 14.
35. *Alabama and Coushatta Tribes of Texas v. Big Sandy ISD,* 817 F. Supp. 1319 (E.D. Tex. 1993), *remanded without opinion,* 20 F.3d 469 (5th Cir. 1994).
36. *Id.* at 1323-4.
37. *New Rider v. Board of Educ. of ISD No. 1, Pawnee County, Okla.,* 480 F.2d 693 (10th Cir. 1973).
38. *Id.* at 698.
39. *Cheema v. Thompson,* 67 F.3d 883 (9th Cir. 1995).
40. *Id.* at 886.
41. *Olesen v. Bd. of Educ. of School Dist. No 228,* 676 F. Supp. 820 (N.D. Ill. 1987).
42. *Bivens v. Albuquerque Public Schools,* 899 F. Supp. 556 (D.N.M. 1995).
43. *Jeglin v. San Jacinto Unified School Dist.,* 827 F. Supp. 1449 (C.D. Cal. 1993).
44. *Id.*
45. *Id.*

continued on page 16

The principal told the teacher that she could attempt to resign from her contract if she needed to move; however, the principal warned the teacher that if she resigned after the last day for unilateral resignations, her resignation would be subject to Board approval. The principal also cautioned her that the Board might not approve her resignation if it could not find a replacement teacher. The teacher nevertheless signed the contract. After the last day for unilateral resignations, but during the first school semester, the teacher's husband got a job in another city and the teacher resigned, stating she did not want to live apart from her husband. She left lesson plans and copies of tests to help whoever would take over her class. The Board did not approve her resignation. Due to the difficulties in finding a math teacher, the district used a series of substitutes to teach the math class. The district did not find a math teacher until the following spring semester. The district asked the Commissioner to take action against the teacher's teaching certificate for resigning without good cause and without consent.

The Commissioner may take action against a teacher's license if the teacher fails to perform her contract without good cause and without the consent of the Board. The Commissioner acknowledged that the teacher failed to perform the contract without the consent of the Board. However, the teacher had good cause in failing to perform her contract. The Commissioner determined that separation of families due to job transfers constitutes good cause for abandoning a contract, especially when the employee attempts to mitigate the circumstances. Here, the teacher mitigated the situation by leaving lesson plans and exams. As a result, the Commissioner denied the district's request and refused to sanction the teacher's certificate. College Station ISD v. Wellborn, Dkt. No. 055-TTC-1196 (Comm'r Educ. January 15, 1998).

The Teachers' Speech Concerning Wearing Jeans At Work, Grade Disputes, Or Class Schedules Did Not Implicate Their Free Speech Rights; The District Did Not Transfer The Teachers In Retaliation Of Their Speech

The district's policy on transfers required the principal to request approval from the area superintendent to transfer a particular teacher. At the request of the teacher, the area superintendent had to meet with the principal and the teacher to discuss the matter. Transfers were not allowed for disciplinary reasons or because of unsatisfactory performance unless the transfer provisions were followed or the teacher consented to the transfer. Based on that policy, a principal requested approval to transfer various teachers. However, the teachers either did not ask for a meeting with the area superintendent or canceled a scheduled meeting without ever rescheduling another meeting. The district transferred the teachers, and they appealed to the Commissioner.

The teachers argued the district did not follow its policy when it failed to hold a meeting between the superintendent and the teachers. The Commissioner disagreed, finding the burden to request a meeting or reschedule a canceled meeting was on the teachers.

The teachers also contended that they were transferred for exercising their freedom of speech. In particular, one teacher claimed she was retaliated against because she disagreed with the principal about a student's grade and about leaving school early. Other teachers asserted they were transferred because they participated in union discussions about teachers' being able to wear jeans to work. Another teacher felt she was transferred for asking to teach French in the afternoon. The Commissioner concluded that none of the teachers' free speech rights was implicated. Protected speech has to involve a matter of public concern. None of the teachers' purported speech involved matters important to the public; instead, the speech concerned only the day to day operation of the school. Additionally, the Commissioner found that the principal had asked to transfer the teachers for other reasons. One teacher was transferred due to a personality conflict and another was transferred because she expressed unhappiness at being at that particular school. Therefore, the Commissioner concluded that the district did not transfer the teachers in retaliation for their speech. The Commissioner denied the appeal, holding in favor of the district. Houston Federation of Teachers v. Erwin, Dkt. No. 049-R3-1195 (Comm'r Educ. January 9, 1998).

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continued from page 8

46. *Chalifoux v. New Caney ISD*, 976 F. Supp. 659 (S.D. Tex 1997).
47. *Stephenson v. Davenport Community School Dist.*, 110 F.3d 1997.
48. *Id.* at 1310.
49. "Students to Sport School Uniforms in San Antonio," *Austin American-Statesman*, Dec. 9, 1997.
50. Texas Education Code, § 11.162
51. "Students to Sport School Uniforms in San Antonio," *Austin American-Statesman*, Dec. 9, 1997.
52. *Phoenix Elem. School Dist. v. Green*, 1997 Ariz. App LEXIS 52 (Ariz. App. 1997).
53. *Levon v. O'Rourke*, 1996 U.S. Dist. LEXIS 19378 (N.D. Ill 1996).
54. *Harper v. Edgewood Board of Educ.*, 655 F. Supp. 1353 (S.D. Ohio 1987).
55. *Fowler v. Williamson*, 448 F. Supp. 497 (W.D.N.C. 1978).

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Student-To-Student Sexual Harassment: A Taxonomy of Court Decisions - Which Tack Will the Supreme Court Take in a Sea of Analyses?

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Student-to-Student Sexual Harassment: Case Law Taxonomy - Post Lago Vista

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CASE			FACTS				OUTCOMES BY BASIS & DEFENDANT			STANDARDS FOR LIABILITY		ANALYSIS		MISCELLANEOUS		
Date	Name	Court	Level	Gender	Conduct	Persons Notified	Title IX	§1983	State Law	Knowledge	Response	Title VII	OCR Guidelines	Qualified Immunity	Punitive Damages	Written Policy /Effect
6/98	***Gebser v. Lago Vista Indep. Sch. Dist.***	*U.S.*	***M-H***	***M-F Teacher-Student***	***5 Sexual Relationship***		***RD-S.D.***			***Actual-by a school official who had the authority to institute corrective measures***	***DI***	***CD***	***CI***			***No-violation of Dept. of Ed. requirements but not enough for damages***
	1ST CIRCUIT															
8/97	Doe v. Oyster River Cooperative Sch. Dist.	D.N.H.	M	M-F	2	C, VP	RS-S.D.	NR-S.D. (DP)				**CA**	NM		RD-S.D.	Yes-revised following onset of events; showed corrective measures
6/97	Doe v. Londonderry Sch. Dist.	D.N.H.	M	M-F	1	C, VP, P, A.	RS-S.D.	RD-S.D. (DP, EP)	A-S.D. (NIED, N)	Actual		**CI**	CI		NR-S.D.	
	2ND CIRCUIT															
7/96	Bruneau v. South Kortright Cent. Sch. Dist.	N.D.N.Y.	M	M-F	3	T, A	RS-S.D.; DV-Ind.	NR-S.D. (IX)		Actual		**CA**				Yes-showed reasonable avenue for complaint
6/95	Menonne v. Gordon	D. Conn.	H	M-F	2	T, C, A	RD-Ind.	NR-S.D. (IX, 14th Am.) NR-Ind. (IX, 14th Am.)				CD		G (IX)		

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CASE			FACTS				OUTCOMES BY BASIS & DEFENDANT			STANDARDS FOR LIABILITY		ANALYSIS		MISCELLANEOUS		
Date	Name	Court	Level	Gender	Conduct	Persons Notified	Title IX	§1983	State Law	Knowledge	Response	Title VII	OCR Guidelines	Qualified Immunity	Punitive Damages	Written Policy /Effect
	3RD CIRCUIT															
2/97	Collier v. William Penn Sch. Dist.	E.D. Pa.	M-H	M-F	3	T, S, A	RS-S.D.; NR-Ind.	NR-S.D. (DP)	NR-S.D. (IIED, N); NR-Ind. (N); RD-Ind. (IIED)	Actual		**CA**			NR-S.D.	
	4TH CIRCUIT															
	5TH CIRCUIT															
4/96	Rowinsky v. Bryan Indep. Sch. Dist.	5th Cir.	M	M-F	3	T, VP, A, B	RS-S.D.			Actual		**CD**				
4/97	Piwonka v. Tidehaven Indep. Sch. Dist.	S.D. Tex.	H	M-F	3	P	RD-S.D.; DV-Ind.	DV-S.D.; DV-Ind.		Actual		**NM**	**NM**			
9/94	Garza v. Galena Park Indep. Sch. Dist.	S.D. Tex.	H	M-F	2	P	DV-S.D.; NR-Ind.	NR-S.D. (DP); DV-Ind.				**NM**		G (alternate grounds for dismissal)		

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CASE			FACTS				OUTCOMES BY BASIS & DEFENDANT			STANDARDS FOR LIABILITY		ANALYSIS		MISCELLANEOUS		
Date	Name	Court	Level	Gender	Conduct	Persons Notified	Title IX	§1983	State Law	Knowledge	Response	Title VII	OCR Guidelines	Qualified Immunity	Punitive Damages	Written Policy /Effect
	6TH CIRCUIT															
11/97	Alton v. Board of Educ. of Boyne City Pub. Sch.	W.D. Mich.	H	M-F	3	C, P	RD-S.D.; NR-Ind.	RD-S.D. (EP)	RD-S.D.(CR); RD-Ind. (CR)		DI	CD	NM			Adopted after harassment occurred
12/96	Franks v. Kentucky Sch. for the Deaf	E.D. Ky.		M-F	5	A	RS-S.D.; NR-Ind.		NR-S.D. (N); A-Ind. (N)			CI				
	7TH CIRCUIT															
3/98	Doe v. University of Illinois	7th Cir.	H	M-F	3	C, P, A	RS-S.D.			Actual		CA	CA			
7/96	Nabozny v. Podlesny	7th Cir.	M-H	M-M	3 (orient-ation)	C, P, A		RS-S.D. (EP); RS-Ind. (EP)		[Actual]	[DI]			R (EP)		Yes-showed different treatment based on sex
	8TH CIRCUIT															
4/98	Bosley v. Kearney	8th Cir.	E	M-F	3	T, P, B	RG-S.D.	NR-S.D. (DP)		Actual		NM	NM			
8/96	Wright v. Mason City Comm. Sch. Dist.	N.D. Iowa	H	M-F	1	A	RG-S.D.			Actual		CI				No
6/96	Burrow v. Postville Comm. Sch. Dist.	N.D. Iowa	H	M&F-F	3	T, C, P, S	RS-S.D.; NR-Ind.	NR-S.D. (DP); NR-Ind. (DP)	RS-S.D. (NIED); RS-Ind. (NIED); RD-S.D. (IIED); RD-Ind.(IIED)	Actual		CA				

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CASE			FACTS				OUTCOMES BY BASIS & DEFENDANT			STANDARDS FOR LIABILITY		ANALYSIS		MISCELLANEOUS		
Date	Name	Court	Level	Gender	Conduct	Persons Notified	Title IX	§1983	State Law	Knowledge	Response	Title VII	OCR Guidelines	Qualified Immunity	Punitive Damages	Written Policy /Effect
	9TH CIRCUIT															
4/98	Oona v. McCaffrey	9th Cir.	M	M-F	3	T, P, A		RS-Ind. (IX)		▨ Actual	■	**CA**	NM	R (IX)		
5/95	Doe v. Petaluma City Sch. Dist.	9th Cir.	M	M&F-F	1	C, P		DV-Ind. (IX)				**CA**		G (IX)		
4/97	Nicole M. v. Martinez Unified Sch. Dist.	N.D. Cal.	M	M-F	3	P, S	RS-S.D.	RS-Ind. (IX); RS-Ind. (EP); RD-Ind. (privacy)	RS-S.D. (CR); NR-S.D. (N, NIED, SH); **RS-**Ind. (CR); **NR-**Ind. (NIED, N)	■	■	**CA**	NM	R (IX); G (privacy)		
7/96	Doe v. Petaluma City Sch. Dist.	N.D. Cal.	M	M&F-F	1	C, P	RS-S.D.			■	■	**CA**				
5/95	Oona v. McCaffrey	N.D. Cal.	M	M-F	3	T, P, A		RS-Ind. (IX); A-Ind. (EP, DP)			[ID]	**NM**		R (IX)		
	10TH CIRCUIT															
5/96	Seamons v. Snow	10th Cir.	H	M-M	4	P, S, A	RD-S.D.	NR-S.D. (IX); RD-S.D. (DP); RS-S.D. (1st Am.); NR-Ind. (IX); RD-Ind. (DP); RS-Ind. (1st Am.)		▨	▨	**NM**		R (1st Am.)		

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CASE			FACTS				OUTCOMES BY BASIS & DEFENDANT			STANDARDS FOR LIABILITY		ANALYSIS		MISCELLANEOUS		
Date	Name	Court	Level	Gender	Conduct	Persons Notified	Title IX	§1983	State Law	Knowledge	Response	Title VII	OCR Guidelines	Qualified Immunity	Punitive Damages	Written Policy /Effect
	11TH CIRCUIT															
8/97	Davis v. Monroe County Bd. of Educ.	11th Cir.	E	M-F	2	T, P	NR-S.D.			▨	▨	CD	CD			

Student-to-Student Sexual Harassment: Case Law Taxonomy Chart Codes

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Level

E	elementary level environment (kindergarten through fifth grade)
M	middle level environment (sixth through eighth grade)
H	high school level environment (ninth through twelfth grade)
M-H	middle and continuing into high school level environment

Gender

M-F	male perpetrator(s) and female target
M&F-F	male and female perpetrators and female target
M-M	male perpetrator(s) and male target

Conduct

1	verbal harassment by more than one student of a clear sexual nature
2	verbal and physical harassment by one student of a clear sexual nature
3	verbal and physical harassment by more than one student of a clear sexual nature
4	verbal and physical harassment by more than one student of ambiguous or non-sexual nature
5	physical harassment by one or more students

Persons Notified

A	administrator(s) other than principal
B	school board
C	counselor
P	principal
S	supervisor(s)
T	teacher(s)

Outcomes by Basis & Defendant

RS-S.D.	court recognized a cause of action against the school district and found the evidence in support of the claim sufficient to survive a motion to dismiss or motion for summary judgment (includes cases remanded to lower court for further action)
RG-S.D.	court recognized (including *arguendo*) a cause of action against the school district but granted the school district's motion for a judgment notwithstanding a jury verdict (JNOV) in favor of the plaintiff
RD-S.D.	court recognized a cause of action against the school district but dismissed on a motion for summary judgment or motion to dismiss due to insufficient evidence to support it
DV-S.D.	court dismissed the claim against the school district with a vague explanation
NR-S.D.	court did not recognize a viable cause of action against the school district under existing law (includes findings of preclusion)
A-S.D.	court avoided ruling on the claim against the school district
RS-Ind.	court recognized a cause of action against individual school personnel and found the evidence in support of the claim sufficient to survive a motion to dismiss or motion for summary judgment (includes cases remanded to lower court for further action)
RD-Ind.	court recognized a cause of action against individual school personnel but dismissed on a motion for summary judgment or motion to dismiss due to insufficient evidence to support it, or due to a finding of qualified immunity
DV-Ind.	court dismissed the claim against individual school personnel with a vague explanation
NR-Ind.	court did not recognize a viable cause of action against individual school personnel under existing law
A-Ind.	court avoided ruling on the claim against individual school personnel

Parenthetical References

IX	Title IX
1st Am.	First Amendment
14th Am.	Fourteenth Amendment, unspecified
DP	Due Process
EP	Equal Protection

State Law

CR	civil rights statute
IIED	intentional infliction of emotional distress
N	negligence
NIED	negligent infliction of emotional distress
SH	sexual harassment

Title VII & OCR Guidelines

CA	court cites and applies, at least in part
CD	court cites and distinguishes
CI	court cites then ignores
NM	court does not mention

Knowledge

Actual	the court requires, at a minimum, the defendant knew of harassment
Constructive	the court requires, at a minimum, the defendant should have known of harassment

Response

ID Intentional Discrimination

e.g., "...responded to sexual harassment claims differently based on sex."[1]

"...intended to create a hostile educational environment for the plaintiff."[2]

"...intentionally failed to take the proper remedial measures because of the plaintiff's sex."[3]

DI Deliberate Indifference

e.g., "...response exhibits such indifference as to indicate an attitude of permissiveness that amounts to discrimination."[4]

"...refuses to take action..."[5]

"...an official decision...not to remedy the violation."[6]

Neg. Negligence

e.g., "...failed to take steps reasonably calculated to end [the harassment]"[7]

"...provided no reasonable avenue of complaint or...did nothing about it."[8]

"...failed to remedy the situation."[9]

Qualified Immunity

G	granted
R	rejected

Post Lago Vista

■	Raised	▥	Validated
▩	Lowered	▒	Filled

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[1] Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1016 (5th Cir. 1996).

[2] Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 74 (D.N.H. 1997).

[3] Wright v. Mason City Comm. Sch. Dist., 940 F. Supp. 1412, 1420 (N.D. Iowa 1996)

[4] Alton v. Board of Educ. Of Boyne City Public Sch., 1997 U.S. Dist. LEXIS 20046, at *24-25 (W.D. Mich. 1997)

[5] Gebser v. Lago Vista Indep. Sch. Dist., 1998 U.S. LEXIS 4173, *30 (June 22, 1998).

[6] Gebser v. Lago Vista Indep. Sch. Dist., 1998 U.S. LEXIS 4173, *30 (June 22, 1998).

[7] Doe v. Oyster River Cooperative Sch. Dist., 992 F. Supp. 467, 479 (D.N.H. 1997).

[8] Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 177 (N.D.N.Y. 1996).

[9] Franks v. Kentucky Sch. for the Deaf, 956 F. Supp. 741, 748 (E.D. Ky. 1996).

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SESSION C8: LEARNING THE LAW: THE GROWING FIELD OF IN-HOUSE SCHOOL COUNSEL

What Issues Spawn Litigation? One State's Perspective

November 21, 1998

Education Law Association
Charleston, South Carolina

Dr. Gregory M. Logan, Assistant Dean
The George Washington University

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ACTUAL LITIGATION INVOLVING VIRGINIA SCHOOL DIVISIONS, 1991-95

Issues	State Court	Federal Court
1 - Compulsory Attendance		
Parent of Student vs School Board	2	0
School Board vs Parent of Student	1	0

Initial plaintiffs lost two of the three cases. School boards won all three cases.

2 - Contacts With Vendors		
Contractor vs School Board	1	1

Initial plaintiff lost both cases.

3 - Control and Use of Property		
Church vs School Board	0	1

Initial plaintiff won the case.

4 - Freedom of Information Act		
Superintendent vs School Board	1	0

Initial plaintiff won the case.

5 - Grievance Procedures		
Teacher vs School Board	1	0

Initial plaintiff lost the case.

6 - Negligence		
Adult Non-Employee vs School Board	2	0
Student vs School Board	1	1
Teachers vs School Board	1	0

Initial plaintiff lost all five cases.

7 - Professional Personnel Assignment		
Teacher vs School Board	3	3

Initial plaintiffs lost all six cases.

		State Court	Federal Court
8 -	Professional Personnel Employment		
	Librarian vs School Board	0	1
	Principal vs School Board	0	1
	Teacher vs School Board	2	4
Initial plaintiff lost all eight cases.			
9 -	Special Education		
	Student vs School Board	2	8
Initial plaintiff lost seven of ten cases.			
10 -	Student Rules and Conduct		
	Parent of Student vs School Board	0	1
	Student vs School Board	1	1
Initial plaintiff won one of the three cases.			
11 -	Workers' Compensation		
	School Board vs Non-Teacher Employee	3	0
	Non-Teacher vs Employee School Board	4	0
	School Nurse vs School Board	1	0
	Teacher vs School Board	6	0
	School Board vs Teacher	4	0
Initial plaintiff lost all 18 cases. (Original award held in all 18)			
	Total Litigation	36	22

School Boards won 45 cases.
School Boards lost 13 cases.

School Boards were the initial plaintiffs in 8 of the 58 cases.

FREQUENCY OF AVOIDED LITIGATION

Recognizing that actual litigation is but the tip of the iceberg, Virginia's Superintendents were surveyed as to legal issues concerning which they were able to avoid litigation through the utilization of a range of formal and informal procedures and techniques.

Issue	Frequency of Avoidance Noted	Percentage of Superintendents Stating Avoidance
Special Education	68	.74
Professional Personnel Employment	55	.60
Student Rules and Conduct	50	.53
Contracts with Vendors	37	.40
Grievance Procedures	31	.34
Freedom of Information Act	25	.27
Professional Personnel Assignment	23	.25
Workers' Compensation	21	.23
Negligence	17	.18
Compulsory Attendance	7	.07
Control and Use of Property	7	.07
Curriculum and Instructional Materials	6	.06
Discrimination Complaints by Students	4	.04
Sexual Harassment	4	.04
Transportation	4	.04
Non-professional Employee	3	.03

Issue	Frequency of Avoidance Noted	Percentage of Superintendents Stating Avoidance
Employment		
Risk Management	3	.03
Student Prayer	2	.02
Virginia High School League	2	.02
Non-professional Employee Assignment	1	.01
School Consolidation Disagreement	1	.01

Higher Education Students and Disability Law

Stephen B. Thomas, Professor
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1998

Higher Education Students and Disability Law

FOURTEENTH AMENDMENT

Under the Fourteenth Amendment, rational basis scrutiny is applied where the discrimination in facial, and intent is required where the discrimination is facially neutral.

SECTION 504 OF THE REHABILITATION ACT OF 1973, 29 U.S.C. § 794 (1998).

29 U.S.C. § 794(a)

No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

34 CFR 104.3 Definitions

"Handicapped person" means any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

"Physical or mental impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal, special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

"Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

"Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

"Is regarded as having an impairment" means has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of attitudes of others toward such an impairment; or has none of the impairments defined above but is treated by a recipient as having such an impairment.

"Qualified handicapped person" means, with respect to postsecondary education, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity. The term technical standard refers to all nonacademic admissions criteria that are essential to participation in the program in question.

The term includes, however, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and . . . drug addiction and alcoholism (34 § CFR 104.6).

It should be emphasized that a physical or mental impairment does not constitute a handicap for purposes of § 504 unless its severity is such that it results in substantial limitation of one or more major life activities. The Department does not believe that a definition of this term is possible at this time.

Physical or mental impairment is defined to include, among other impairments, specific learning disabilities which describes such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

34 CFR 104.42 Admissions and recruitment.

(a) Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient.

(b) In administering its admission policies, a recipient:

(1) may not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) may not make use of any test or criterion for admission that has a disproportionate adverse effect on handicapped persons or any class of handicapped persons unless the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question and alternate

tests or criteria that have a less disproportionate, adverse effect are not shown by the Assistant Secretary to be available;

(3) shall assure itself that admissions tests are

selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure);

designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and

administered in facilities that, on the whole, are accessible to handicapped persons; and

(4) may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

(c) Preadmission Inquiry Exception. When a recipient is taking remedial action to correct the effects of past discrimination pursuant to & 104.6(a) or when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity, the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, provided, that: the recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and the recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) A recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

34 CFR 104.44 Academic adjustments.

(a) A recipient shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by each student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) A recipient may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) A recipient shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills. Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

34 CFR 104.45 Housing.

(a) A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. Such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.

(b) A recipient that assists any agency, organization, or person in making housing available to any of its students shall take any action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

34 CFR 104.46 Financial and employment assistance to students.

In providing financial assistance to qualified handicapped persons, a recipient may not, on the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate, or assist any entity that provides assistance to any of the recipient's students in a manner that discriminates against qualified persons on the basis of handicap. A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap if the overall effect of award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

34 CFR 104.47 Nonacademic services.

In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of 104.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

A recipient that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

AMERICANS WITH DISABILITIES ACT, 42 U.S.C. § 12101 (1998).

TITLE II--42 U.S.C. § 12132--No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity.

TITLE III--42 U.S.C. § 12182(a)--No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation or by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12189--Any person that offers examinations . . . related to applications, licensing, certification, or credentialing for . . . professional. . . purposes shall offer such examination . . . in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

42 U.S.C. § 12182(b)(2)(A)(ii)--requires a plaintiff to demonstrate that his requested accommodation is reasonable and does not fundamentally alter the nature of the program.

1990S APPELLATE COURT CASE LAW

STATUTE OF LIMITATIONS

Everett v. Cobb County School District, 138 F.3d 1407 (11th Cir. 1998) (finding appellant's claims to be time barred; the court applied the state two-year limitations period for personal injury actions). [Kennesaw State College is among the defendants in this case.]

Morse v. University of Vermont, 973 F.2d 122 (2d Cir. 1992) (finding appellant's claims to be time barred; the court applied the state three-year limitations period for personal injury actions). Moreover, the court noted that under federal law, a claim accrues when the plaintiff knows or has reason to know of the injury. "The proper focus is on the time of the discriminatory act, not the point at which the consequences of the act become painful" (citing Chardon v. Fernandez, 454 U.S. 6, 8 (1981).

Wolsky v. Medical College of Hampton Roads, 1 F.3d 222, 85 Educ. L. Rep. 28 (4th Cir. 1993) (finding that the one-year statute of limitations used for the Virginia Rights of Persons With Disabilities Act had expired in a case where a medical student who suffered from panic disorder was dismissed and denied readmission; the VRPDA was used rather than the two-year period for personal injury actions).

Baker v. Board of Regents of Kansas, 991 F.2d 628, 82 Educ. L. Rep. 337 (10th Cir. 1993) (concluding that the state two-year statute of limitations period for personal injury action applied to §§ 1983 and 504 cases; § 504 claims were identified as closely analogous to § 1983 actions). Although apparently academically qualified, the plaintiff had performed poorly in the interview and was not admitted to medical school. The court disagreed with the plaintiff that the doctrine of equitable tolling applied in order to extend the limitations period, alleging that the university prevented the plaintiff from knowing that a cause of action existed. The court noted that plaintiff must show that defendant had acted affirmatively (or through its silence if the plaintiff would have filed the claim had he or she had knowledge) to prevent discovery of the cause of action. In the present case, the plaintiff was aware that a cause of action existed long before the limitations period expired but failed to timely file.

Morse v. University of Vermont, 973 F.2d 122, 77 Educ. L. Rep. 34 (2d Cir. 1992) (holding that a complaint by a former student with hypothyroidism, who was terminated when she failed to meet the five-year requirement for the completion of course work, was time barred, but that the state claim should be remanded).

TESTING

In re Petition of Frickey, 515 N.W.2d 741 (Minn. 1994) (ordering the removal of three questions from the state bar examination regarding mental health).

In re Petition and Questionnaire for Admission to the Rhode Island Bar, 683 A.2d 1333 (R.I. 1996) (adjusting wording of state bar examination to help identify competent counsel, yet protect the privacy rights of applicants--questions dealt with drug use and disability).

Pandazides v. Virginia Board of Education, 13 F.3d 823, 88 Educ. L. Rep. 963 (4th Cir. 1994) (holding that the Seventh Amendment entitled a teacher, who allegedly had been discriminated against on the basis of her learning disability during the National Teacher Examination, to a jury trial; the ETS had offered a separate room, 50% more time, a script of the listening portion, and a special tape player that allowed the replaying of the listening portion at a slower rate with no vocal distortion; such modifications were not helpful as she failed the test again; she requested an untimed examination and the administration of the test by an examiner with whom the plaintiff could interact; such a request was denied; the plaintiff sued and eventually won the right to a jury trial).

Wynne v. Tufts University School of Medicine, 976 F.2d 791, 77 Educ. L. Rep. 1136 (1st Cir. 1992), *reh'g denied*, 507 U.S. 1030 (1993) (holding that former medical school student with cognitive deficits was not discriminated against when the school failed to offer him an alternative to a multiple-choice biochemistry examination; he already had been allowed to retake classes and to repeat his first year of studies, notwithstanding his failure of numerous courses; the use of a multiple-choice test was found fair).

Wynne v. Tufts University School of Medicine, 932 F.2d 19, 67 Educ. L. Rep. 497 (1st Cir. 1991) (en banc) (denying summary judgment on a § 504 issue as fact issues remained regarding whether the student was otherwise qualified; a test for determining whether the institution adequately explored the availability of reasonable accommodations is provided).

Pandazides v. Virginia Board of Education, 946 F.2d 345, 70 Educ. L. Rep. 371 (4th Cir. 1991) (holding that a determination of whether a teacher was otherwise qualified involved two factual determinations--whether the teacher could perform essential functions of a school teacher and whether requirements imposed by the Board actually measured those functions). On remand, the lower court held for the Board--the teacher failed to establish the existence of an impairment that substantially limited a major life activity; the test accommodations provided the teacher were not unreasonable; and the teacher was not otherwise qualified.

ADMISSION/ADVANCEMENT

Ohio Civil Rights Commission v. Case Western Reserve University, 666 N.E.2d 1376, 110 Educ. L. Rep. 1202 (Ohio 1996) (concluding that an applicant to medical school who was blind was not otherwise qualified under state statute, in part because she was not able to "observe" and "perform in a reasonably independent manner" as was required by the Association of American Medical Colleges; no identified accommodation would enable the student to be otherwise qualified to meet basic core requirements expected of all students). The court also concluded that under state law an "otherwise qualified handicapped person" was one who is able to safely and substantially perform an educational program's essential requirements with reasonable accommodation. But, an accommodation is not reasonable where it requires a fundamental alteration in the essential nature of the program or imposes an undue financial or administrative burden.

Mallett v. Marquette University, No. 94-3246, 1995 U.S. App. LEXIS 24324 (7th Cir. August 24, 1995) (affirming a lower court decision where the court granted summary judgment for the university; the law school applicant had been denied admission based on his low score on a nonstandard LSAT--scoring in the lower 1-2%; the admissions committee considered the score, but also gave careful attention to his entire file, including life experiences and background and had concluded that he was not qualified).

FINANCIAL AID

REASONABLE ACCOMMODATION

Rodgers v. Curators of University of Missouri, 135 F.3d 1216 (8th Cir. 1998) (upholding dismissal with prejudice against appellant for intentionally failing to comply with court orders and to prosecute the complaint; as a result, plaintiff was "forever denied his day in court" where he claimed that a university failed to accommodate his learning difficulties due to a head injury).

Salehpour v. University of Tennessee, No. 97-5468, 1998 U.S. App. LEXIS 21381 (6th Cir. August 27, 1998) (concluding that a university must first know of the existence of a disability before it is found to have discriminated solely based on disability; a student who voluntarily left the university alleged that he should have been permitted to sit on the back row due an injury to his head, neck, and spine).

Robinson v. Hamline University, C4-93-2074, 1994 Minn. App. LEXIS 432 (Minn. Ct. App. May 10, 1994) (affirming summary judgment with prejudice in a case where a former law student with a mild reading disability alleged that the university failed to accommodate him by providing him with a personal tutor--the university had provided access to a learning disability tutor, extended test times, made a legal writing manual available for use, and permitted plaintiff to attend a series of four academic support lectures).

PARKING & TRANSPORTATION

Madsen v. Boise State University, 976 F.2d 1219, 78 Educ. L. Rep. 219 (9th Cir. 1992) (holding that a student with a disability who had never applied for a free handicap parking permit lacked standing to bring the action).

Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368, 66 Educ. L. Rep. 35 (3d Cir. 1991) (finding that issues of material fact existed as to whether a medical college knew of a student's accident related back problem and whether the college provided reasonable accommodation; the student had requested a straight-back chair and closer parking).

United States v. Board of Trustees for the University of Alabama, 908 F.2d 740, 61 Educ. L. Rep. 1174 (11th Cir. 1990) (holding that the university practice of determining availability of auxiliary services to students with disabilities based on financial ability or their enrollment in credit courses and degree programs was a violation of § 504; that the provision of transportation services to the disabled for only four hours per day when regular, but nonaccessible, transportation was provided twelve hours per day also violated federal statute). (The lower court also held that the university had failed to make its business education labs and swimming pool accessible, but those determinations were not appealed.)

INTERPRETER SERVICES

HOUSING

ARCHITECTURAL BARRIERS

SPORT PARTICIPATION

Knapp v. Northwestern University, 101 F.3d 473, 114 Educ. L. Rep. 460 (7th Cir. 1996) (concluding that student was not illegally discriminated against when he was denied the opportunity to participate in intercollegiate basketball due to having failed a physical), *cert. denied*, 117 S. Ct. 2454 (1997).

HOSTILE ENVIRONMENT/HARASSMENT

Rothman v. Emory University, 123 F.3d 446, 120 Educ. L. Rep. 984 (7th Cir. 1997) (concluding that plaintiff's claims of discrimination and hostile environment were without support).

DISMISSAL

Scott v. Western State University College of Law, No. 96-56088, 1997 U.S. App. LEXIS 9089 (9th Cir. April 25, 1997) (concluding that student was dismissed from college due to poor academic performance and not due to disability; the institution was unaware that the student was disabled at the time of his disability).

Doe v. Harvard University, Nos. 93-2051, 93-2234, 94-1589, 1994 U.S. App. LEXIS 28320 (1st Cir. Oct. 12, 1994) (concluding that suspended student failed to support the claim that her dismissal was based on disability). The plaintiff also claimed that Harvard (a private university) had violated § 1983 and the IDEA, notwithstanding the fact that the IDEA does not apply to higher education.

McGregor v. Louisiana State University Board of Supervisors, 3 F.3d 850 (5th Cir. 1993) (holding that a law student's requests for accommodation would result in the fundamental alteration of the school's academic standards; prior to his denial of advancement to the third year, he had requested part-time status, at-home exams, and a lower GPA requirement). The key question in the case was whether the plaintiff was otherwise qualified for retention in the program. One professor had accommodated him by providing virtually unlimited office hours; moreover, the program provided him with a handicapped parking permit, tutorial assistance, and additional time to complete his Criminal Law exam. He had requested that the Center allow him to be a part-time student and to take exams at home.

Wood v. President and Trustees of Spring Hill College, 978 F.2d 1214, 78 Educ. L. Rep. 314 (11th Cir. 1992) (affirming jury verdict for the college in a case where a schizophrenic student alleged that she had been constructively dismissed from the college; moreover, she had failed to prove intent for the compensatory award).

Villanueva v. Columbia University, 746 F. Supp. 297, 63 Educ. L. Rep. 189 (S.D.N.Y. 1990), *aff'd*, 916 F.2d 709 (2d Cir. 1990) (affirming summary judgment in a case where a former graduate student with cerebral palsy brought action claiming that she was discriminated against when her participation in a Ph.D. program was terminated; she had twice failed her written qualifying examination in sociomedical sciences research methods; the handbook specifically stated that a student may not continue if he or she failed the exam twice).

Russell v. Salve Regina College, 938 F.2d 315, 68 Educ. L. Rep. 982 (1st Cir. 1991) (holding on remand from the Supreme Court that the doctrine of substantial performance applied to contracts with Rhode Island; an over-weight nursing student substantially met her obligation to a university, but the university failed to meets its obligation when it asked her to withdraw from its program).

Salve Regina College v. Russell, 499 U.S. 225, 69 Educ. L. Rep. 1030 (1991) (holding that a court of appeals must review de novo a district court's determination of state law).

Murphy v. Franklin Pierce Law Center, 882 F. Supp. 1176, 100 Educ. L. Rep. 86 (D.N.H. 1994), *aff'd without published opinion*, 56 F.3d 59, 100 Educ. L. Rep. 909 (1st Cir. 1995) (finding that a student with vision impairment was not discriminated against solely due to disability when she was dismissed due to poor performance notwithstanding accommodations provided--reduced course load, opportunity to retake a test, extra time to complete other exams).

Session D.2

Student Discipline Post-IDEA Reauthorization:

Is the Pendulum Swinging Back to Segregated Settings?

Presenters:

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Education Law Association Annual Conference
Charleston, South Carolina
November 21, 1998

TRACKING THE MOMENTUM

"SETTINGS" IN SPECIAL EDUCATION FEDERAL LEGISLATION: AN HISTORICAL PERSPECTIVE

By:
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I. PL 89-750 Elementary and Secondary Education Act
Title VI – Education of Handicapped Children
Passed November 3, 1966

Sec. 604 [State Plans]

(a) -- The plan must provide satisfactory assurance that funds paid to the State under this title will be expended, either directly or through local educational agencies, solely *to initiate, expand, or improve programs and projects, ... (A) which are designed to meet the special educational and related needs of handicapped children throughout the State, (B) which are of sufficient size, scope and quality ... as to give reasonable promise of substantial progress toward meeting those needs, and (C) which may include the acquisition of equipment and where necessary the construction of school facilities.*

(b) The plan must provide satisfactory assurance that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, *provision will be made for participation of such children in programs assisted or carried out under this title.*

(d) The plan must set forth policies and procedures which provide satisfactory assurance that Federal *funds made available under this title will be so used as to supplement and, to the extent practical, increase the level of State, local, and private funds expended for the education of handicapped children*, and in no case supplant such state, local, and private funds.

(i) The plan must provide satisfactory assurance that funds paid to the State under this title shall not be made available to any school for handicapped children eligible for assistance under section 203 (a)(5) of title II of Public Law 874, Eighty-first Congress.

II. PL 91-230. Elementary and Secondary Education Act
Title VI – Education of the Handicapped Act
Passed April 13, 1970

Section 602 [Definitions]

(9) The term *"elementary school"* means a day or residential school which provides elementary education, as determined under State law.

(10) The term *"secondary school"* means a day or residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

Section 605 [Acquisition of Equipment and Construction of Necessary Facilities]

(a) In the case of any program authorized by this title, if the Commissioner determines that such program will be improved by permitting the funds authorized for such program to be used for the acquisition of equipment and the *construction of necessary facilities*, he may authorize the use of such funds for such purposes.

Section 611 [Authorization]

(a) The Commissioner is authorized to make grants pursuant to the provisions of this part for the purpose of assisting the States in the *initiation, expansion, and improvement of programs and projects for the education of handicapped children at the preschool, elementary school, and secondary school levels.*

Section 613 [State Plans]

(a) Any State which desires to receive grants under this art shall submit to the Commissioner ... a state plan ... Such State plan shall --

> (1)set forth ... assurance that *funds paid to the State under this part will be expended (A) ... solely to initiate, expand, or improve programs and projects, ... (i) which are designed to meet the special educational and related needs of handicapped children throughout the State, and (ii) which are of sufficient size, scope, and quality ... as to give reasonable promise of substantial progress toward meeting those needs ...*
>
> (2) provide *satisfactory assurance that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision will be made for participation of such children in programs assisted or carried out under this part ...*
>
> (4) set forth policies and procedures which provide satisfactory assurance that Federal funds made available under this part will be so used as to supplement and, to the extent practical, increase the level of State, local, and private funds expended for the education of handicapped children, and in no case supplant such State, local and private funds ...

Section 621 [Regional Resource Centers]

(a) the Commissioner is authorized to make grants to or contracts with institutions of higher education, State educational agencies or combinations of such agencies or institutions, ...Centers established or operated under this section shall (1) provide testing and educational evaluation ... (2) develop educational programs ... (3) *assist schools and other appropriate agencies ... in providing such educational programs through service such as consultation* ... periodic reexamination and reevaluation of special educational programs, and other technical services.

Section 622 [Centers and Services for Deaf-Blind Children]

(b) the Commissioner is authorized .. to make grants to or contracts with public or *nonprofit private agencies, organization, or institutions to pay all or part of the cost of establishment, including construction ... and operation of center for deaf-blind children ...*

(d)(2) Any such services may be provided to deaf-blind children ... regardless of whether they reside in the center, may be provided at some place other than the center, and may include the provision of transportation for any such children ...

Section 661 [Special Programs for Children with Specific Learning Disabilities]

(a) The Commissioner is authorized to make grants to, and contracts with institutions of higher education, State and local educational agencies ... in order to carry out a program of --

> (3) *establishing and operating model centers for the improvement of education of children with specific learning disabilities, which centers shall (A) provide testing and educational evaluation ... (B) develop and conduct model programs* ... (C) assist appropriate educational agencies ... in making such programs available ...

III. PL 94-142 -- Education for All Handicapped Children Act of 1975 Passed November 29, 1975

Section 602 [Definitions]

(18) the term "*free appropriate pubic education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education programs required under section 614(a)(5) ...*

(19) The term "individualized education program" means a written statement for each handicapped child ... which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, *and the extent to which such child will be able to participate in regular educational programs,*

(D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures ...

Section 612 [Eligibility]
In order to qualify for assistance under this part in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(1) The State has in effect a policy that *assures all handicapped children the right to a free appropriate public education ...*

(5) the State had established ... (B) procedures to assure that, *to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily ...*

Section 613 [State Plans]

(a)(4)(B) that (i) handicapped *children in private schools and facilities will be provided special education and related services ... at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency ... and (ii) in all such instances the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children to served have all the rights they would have if served by such agencies ...*

Section 614 [Application]

(a)(1)(C) establish a goal of providing full educational opportunities to all handicapped children, including --

(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all handicapped children ...

(iv) to the maximum extent practicable ... *the provision of special services to enable such children to participate in regular educational programs ...*

Section 615 [Procedural Safeguards]

(b)(1) The procedures required by this section shall include, but shall not be limited to --

(A) an opportunity for the *parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child ...*

(C) *written prior notice to* the parents or guardian of the child whenever such agency or unit -- *(i)proposes to initiate or change, or* *(ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child* or the provision of a free appropriate public education to the child ...

IV. Public Law 98-199 -- Education of the Handicapped Act Amendments of 1983

Passed December 2, 1983

Section 613 [Participation of Handicapped Children in Private Schools]

(d)(1) If, ... a State educational agency *is prohibited by law from providing for the participation in special programs of handicapped children enrolled in private elementary and secondary schools as required by subsection (a)(4), the secretary shall waive such requirement, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection* (a)(4)

(2)(A) when the Secretary arranges for services pursuant to this subsection, the Secretary, after consultation with the appropriate public and private school officials, shall pay to the provider of such services an amount per child which may not exceed the Federal amount provided per child under this part all handicapped children enrolled in the State ...

Section 626 [Secondary Services and Transitional Services for Handicapped Youth]

(b) Projects assisted under this section may include --

(1) *developing strategies and techniques for transition to independent living, vocational training, post-secondary education, and competitive employment for handicapped youth.*

V. Public Law 101-476 -- Education of the Handicapped Act Amendments of 1990

Individuals With Disabilities Education Act

Passed October 30, 1990

Section 602 [Definitions]

(d) ... inserting the new paragraph:

(19) the term *"transition services"* means a coordinated set of activities for a student, designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment, continuing and adult education, adult services, independent living, or community participation.

Section 618 [Evaluation]

(b)(1)(B) *[provide data regarding] the number of children and youth with disabilities in each State by disability category, who -- (i) are participating in regular educational programs (consistent with the requirements of section*

612(5)(B) and 614(a)(1)(C)(iv)); (ii) are in separate classes, separate schools or facilities, or public or private residential facilities; or (iii) have been otherwise removed from the regular education environment ...

Section 624 [Programs for Severely Handicapped Children]

(e) In awarding such grants and contracts under this section, the Secretary shall include a *priority on programs that increase the likelihood that these children and youth will be educated with their nondisabled peers.*

Section 626 [Secondary Education and Transitional Services for Youth with Disabilities] Detailed descriptions of transitional service expectations

VI. PL 105-17 -- Individuals with Disabilities Education Act Amendments of 1997

Passed June 5, 1997

Section 612 [State Eligibility]

(a)(1)(A) A free appropriate public education is available to al children with disabilities ... including children with disabilities who have been suspended or expelled from school.

(5) Least Restrictive Environment

(A) In General -- *To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled,* and special classes, separate schooling, or other removal of children with disabilities form the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(10)(A) Children *Placed in Private Schools by their Parents*

(i) In General -- To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, *provision is made for the participation of those children in the program* ...

(10)(B) Children *Placed in, or Referred to, Private Schools by Public Agencies*

(i) In General -- ... are *provided special education and related services, in accordance with an individualized education program at no cost to their parents* ...

Section 614 [Evaluations, Eligibility Determinations, IEPs, and Educational Placements (d)(1)(A)(iii) … a statement of the program modifications or supports for school personnel that will be provided for the child …

(II) *to be involved and progress in the general curriculum* …

(III) to be *educated and participate with other children with disabilities and nondisabled children* …

(iv) *and explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities* …

Section 615(k) – Placement in *Alternative Educational Setting*

(1)(A) School personnel … *may order a change in placement* of a child with a disability –

(i) to an *appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days* … and

(ii) to an appropriate *interim alternative educational setting for ... not more that 45 days* if—

(I) the child carries a weapon to school or to a school function … or

(II) the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function …

DISCIPLINE OF STUDENTS WITH DISABILITIES UNDER THE IDEA

by

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I. Short Term Suspensions of Ten (10) Days or Less

A. Suspensions of ten (10) days or less are excluded from the procedures of the IDEA. These suspensions may be imposed by following regular discipline procedures. It is immaterial whether the misconduct is a manifestation of the disability. 20 U.S.C. § 1415(k)(1)(A)(i) and (k)(4)(A).

B. A suspension is defined as a move to an appropriate interim alternative educational setting, another setting, or suspension. Left unaddressed is how to treat bus suspensions, partial day removals, and placements in in-school suspensions if educational services are being provided. § 1415(k)(1).

C. The USDOE limits use of this short term suspension option to ten (10) days cumulative in a school year. The IDEA does not contain any mention of ten days cumulative or ten days at a time so it can be expected that there will be litigation over this issue. Educational services must be provided beginning with the eleventh day of suspension.

D. The Virginia regulations state that a series of short term suspensions that aggregate more than ten days may be subject to the long term discipline procedures. Factors to consider include the length of each suspension, the proximity of the suspensions and the total amount of time suspended. Regulations Governing Special Education Programs for Children with Disabilities in Virginia, § 3.4(A)(11)(b).

II. Handling Long Term Suspensions and Expulsions

A. On the day the disciplinary infraction occurs:

1. The principal or designee should check whether the student is identified as disabled, in the referral process or otherwise to be treated as disabled. You are on notice of a disability for a student even if not identified and must treat them as disabled when, prior to the misconduct:

a. The parent has given written notice to school personnel that the student needs special education services. 20 U.S.C § 1415(k)(8)(B)(i).

b. The behavior or performance of the child indicates the need for special education services. § 1415(k)(8)(B)(ii).

c. The parent has requested a special education evaluation. § 1415(k)(8)(B)(iii).

d. The teacher of the student or other LEA personnel have expressed concern about the behavior or performance of the child to the director of special education or to other LEA personnel. § 1415(k)(8)(B)(iv).

e. Exception: If notice of a disability is not provided until after the misconduct occurs, the child is subject to regular disciplinary procedures. § 1415(k)(8)(C)(i).

(1) Referrals in this case must result in an expedited evaluation. The student remains on suspension or expulsion and in the placement determined by the school division while the evaluation is conducted. § 1415(k)(8)(C)(ii).

(a) There is no definition of "expedited".

(b) Does the requirement to remain in the "educational placement determined by the school division mean that the student must receive educational services? Arguably, the student must be treated the same as other suspended and expelled regular education students.

(2) If the student is found eligible, the school division must provide special education services in accordance with the discipline provisions. IDEA does not state what this means. § 1415(k)(8)(C)(ii).

(3) Presumably, the student must have a manifestation determination, functional behavior assessment, behavior intervention plan, and appropriate alternative education program.

B. The principal or designee conducts an investigation into the allegations surrounding the infraction, if necessary.

C. The principal or designee determines what discipline to impose by referring to School Board policy or the Code of Student Conduct. (Note: the IDEA does not set the limits for punishment.) § 1415(k)(4)(A).

D. Notice of the disciplinary recommendation and of procedural safeguards must be provided to the parents the same day as the decision is made to recommend discipline. § 1415(k)(4)(A)(i).

1. This requirement applies to discipline which will exceed ten (10) school days or for certain weapons or drug offenses. Id.

2. Best practice would be to include with this notice, written notice of a manifestation meeting and an IEP meeting during which a functional behavioral

assessment will be conducted and a behavioral intervention plan developed or reviewed.

E. The student may possibly receive a ten (10) day suspension during this period of time. This area is one in which litigation can be expected. If the student has already received ten days of suspension, it is not specified whether ten additional days are available. Best practice is to provide educational services, possibly at home, following ten days of suspension in a school year.

III. School Days One (1) to Ten (10) Following the Infraction

A. Schedule manifestation and IEP meeting. Parents must receive written notice of the meeting and notice of procedural safeguards. The meeting must be scheduled at a mutually convenient time. § 1415(k)(4)(A)(i).

B. The IEP meeting is held:

1. The IEP team makes the manifestation determination.

    a. Must consider all relevant information regarding the behavior giving rise to the discipline including evaluation and diagnostic results and other information supplied by the parents, observations of the student, and the IEP and placement. A good practice would be to have the student's file present at the meeting. § 1415(k)(4)(C)(i).

    b. Determines whether, regarding the behavior subject to the disciplinary action, the IEP and placement were appropriate and whether the services, supplementary aids and behavior intervention strategies were provided consistent with the IEP and placement. § 1415(k)(4)(C)(ii)(I).

    c. Determines whether the student's disability impaired the ability of the student to understand the impact and consequences of the behavior subject to disciplinary action. § 1415(k)(4)(C)(ii)(II).

    d. Determines whether the student's disability impaired the ability of the student to control the behavior subject to disciplinary action. § 1415(k)(4)(C)(ii)(III).

2. A functional behavior assessment is performed. Presumably, this assessment can occur during the meeting. § 1415(k)(1)(B)(i).

3. A behavior intervention plan is developed or reviewed and revised. The purpose would be to address the problems giving rise to the disciplinary recommendation, to address behaviors which interfere with the student's educational program and to prevent the behaviors from recurring. § 1415(k)(1)(B).

4. An alternative education plan is developed.

5. Note: The manifestation and IEP committees do not determine the amount of discipline to impose.

IV. Process if there is no Manifestation

A. Regular disciplinary procedures may be followed if the committee determines that the behavior is not a manifestation of the student's disability. The disabled student must not be punished more severely than non-disabled students. § 1415(k)(3)(A).

B. Appropriate educational services must continue although in a different educational setting.

1. The alternative education setting must be determined by the IEP team. § 1415(k)(4)(B).

2. The program must allow the student to participate in the general curriculum, although in another setting. § 1415(k)(3)(B)(i).

3. The program must allow the implementation of the IEP goals and objectives and of the modifications and services so that the student can meet the IEP goals and objectives. Id.

4. The program must include services to address the problem behavior so that the behavior does recur. § 1415(k)(3)(B)(ii).

5. The program must provide a free appropriate public education. § 1415(k)(5)(A).

C. The person or persons making the final disciplinary determination must have access to the special education and discipline records of the student. § 1415(k)(5)(B).

V. Process if there is a Manifestation

A. The student is not subject to discipline.

B. The IEP may be reviewed or revised. The revised IEP, if it constitutes a change in placement, can only be implemented if the parent agrees, if there is a finding from a special education hearing officer or if there is a court order. § 1415(k)(6)(A).

VI. Parent Rights

A. The parent has the right to challenge the manifestation and placement decisions in a due process hearing. The hearing must be expedited. § 1415(k)(6).

B. The parent does not have the right to challenge the severity of the discipline in a due process hearing.

VII. Student's Placement as the Special Education Procedures are Followed

A. The student may receive ten (10) days of suspension even if the parent objects. § 1415(k)(4)(A).

B. After the 10 days, the student returns to the regular IEP placement unless you have access to one of the following options:

1. Certain drug and weapons' violations permit placement in an interim alternative special education placement for not longer than 45 calendar days. Parent permission is not required for this forty-five calendar day placement. An IEP must be written specifying the alternative special education program. § 1415(k)(1)(A).

    a. The appropriateness of the interim alternative special education placement in drugs and weapons cases may be reviewed by a hearing officer if requested by the parent. § 1415(k)(6)(A) and (k)(7)(A).

        (1) This hearing must be expedited. § 1415(k)(6)(A)(ii).

        (2) The hearing officer must consider whether:

            (a) there is substantial evidence that maintaining the current placement is substantially likely to result in injury to the student or others; § 1415(k)(2)(A)

            (b) the appropriateness of the student's current placement; § 1415(k)(2)(B)

            (c) the public agency has made reasonable efforts to minimize the risk of harm in the student's current placement, including the use of supplementary aids and services; § 1415(k)(2)(C)

            (d) the alternative setting allows the student to participate in the general curriculum, although in another setting, and to continue to receive the services and modifications of the IEP that will enable the student to meet the IEP goals; and § 1415(k)(2)(1) and(k)(3)(B)(i)

            (e) the program includes services and modifications designed to address the behavior so it does not recur. § 1415(k)(2)(D) and (k)(3)(B)(ii).

            (f) The student returns to the initial placement at the end of 45 calendar days or upon ruling of the hearing officer, whichever first occurs, if a hearing is pending, unless the parent and the school division agree to a different placement, a hearing officer continues the alternative placement or a court injunction is obtained. § 1415(k)(7)(A).

2. Parent gives permission for a change in placement. § 1415(k)(7)(A).

3. Special education hearing officer gives permission to change in placement. § 1415(k)(7)(B).

4. A court injunction is obtained.

5. The IEP committee has determined that there is no manifestation and the school board or final disciplinary authority has acted to impose the long term discipline. It is not clear whether parental permission to the changed program is required in this circumstance but it does not seem logical to require this permission.

C. It is important to act quickly to determine whether there is a manifestation so that a court injunction can be obtained if necessary.

VIII. Recent Developments Interpreting the Discipline-Related Provisions of the Reauthorized IDEA

A. Case Law

1. Doe v. Board of Educ. of Oak Park & River Forest High Sch. Dist. 200, 115 F.3d 1273 (7th Cir. 1997) -- The Seventh Circuit, applying the former IDEA, agreed with the Fourth Circuit that the continuation of educational services to students with disabilities who engaged in misbehavior unrelated to their disabilities was not required under the IDEA, despite OSEP's contrary position. The Reauthorized IDEA was signed into law after this opinion was issued. The Seventh Circuit amended the decision in Doe v. Board of Educ. of Oak Park & River Forest High Sch. Dist. 200, 1997 U.S. App. LEXIS 16538 (7th Cir. 1997), to state that the new law would not be applied retroactively. In doing so, the Court recognized that the new language did not contain a retroactivity clause, and that

> application of the amendment would have a truly retroactive effect -- it would increase a party's liability for past conduct. Under these circumstances, *and although this amendment in the future will undoubtedly lead to a result different from the one reached [in the original opinion]*, we will not apply the amendment retroactively to our decision is this case.

Id. at *2 (emphasis added).

2. Walton Central Sch. Dist. v. Kirk, 28 IDELR 597 (N.D.N.Y. 1998) -- Student with an unspecified disability and a history of violence assaulted the principal. School system sought -- and the Court granted -- an order enjoining the student from attending the school system while the issue of his educational placement was pending. The actual occurrence of serious injury is not the benchmark in determining the appropriateness of injunctive relief. Id. at 599. Also, the school system had taken all possible actions to keep the student in the classroom environment. Id.

3. Gadsden City Bd. of Educ. v. B.P., 28 IDELR 166 (N.D. Ala. 1998) -- Two 14 year old students with mental retardation were suspended for disrupting the classroom. The school requested an injunction to remove the student from

school. The parents objected, arguing that the school had not exhausted its remedies as required by the Reauthorized IDEA.

The Court ruled in favor of the school, holding that the Reauthorized IDEA's provision for expedited hearings did not mandate that the school exhaust its administrative remedies. *See* 20 U.S.C. § 1415(k)(7)(C). The new law provides that the school "may" seek an expedited hearing, which is permissive language. 28 IDELR at 169. It was also unclear whether an expedited hearing was available in the school system. *Id*. Even if it was available, there was no guarantee that such a hearing could occur expeditiously. Further, the statute "does not supply a time period by which such hearing must occur, nor does it supply a time period by which a decision must be rendered." *Id*. The proposed regulations require that an expedited hearing result in a decision within 10 business days of the request for the hearing. *Id*. (citing 34 C.F.R. § 300.528(a)(1) (proposed)). Even if these regulations take effect, some circumstances may make an expedited hearing inadequate. 23 IDELR at 169. Finally, OSEP's view is that the school system can still seek an injunction regardless of the new expedited hearing provision. *Id*. (citing Huefner, Dixie Snow, "The Individuals with Disabilities Act Amendments of 1997," 122 Ed. Law Rep. 1103, at n.28 (1998)).

B. OSERS/OSEP Opinions

1. *Letter to Frist*, 26 IDELR 881 (OSEP 1997) -- OSEP stated that it "would not interpret the [Reauthorized IDEA] as requiring that educational services be provided during this time period." OSEP also stated that it would issue proposed regulations in the very near future that will be consistent with this interpretation. OSEP concluded that

    > [e]ven though the provision of educational services during this time period is not required, we believe that good practice would be to review as soon as possible the circumstances surrounding the events that led to the child's removal and consider whether the child was being provided services in accordance with the individualized education program (IEP) and whether the behavior could be addressed through minor classroom or program adjustments or whether the child's IEP team should be reconvened to address possible changes in that document.

2. OSEP Memorandum 97-7, 26 IDELR 981 (OSEP Sept. 19, 1997) -- This memorandum was characterized as "non-binding/ nonregulatory" guidance, and was issued to provide assistance to school districts regarding discipline prior to the forthcoming release of the proposed IDEA '97 regulations. In a series of questions and answers, OSEP answered the most commonly raised questions regarding the discipline of students with disabilities. These questions, with OSEP's answers, were as follows:

QUESTION 1: Under IDEA, do public agencies have a responsibility, as part of the IEP process, to consider a child's behavior?

ANSWER: Yes. Section 614(d)(2)(B) requires the IEP team "in the case of a child whose behavior impedes his or her learning or that of others, [to] consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior." In addition, school districts should take prompt steps to address misconduct when it first appears. Such steps could, in many instances, eliminate the need to take more drastic measures. These measures also could be facilitated through the individualized education program (IEP) and placement processes required by IDEA. For example, when misconduct appears, a functional behavioral assessment could be conducted, and determinations could be made as to whether the student's current program is appropriate and whether the student could benefit from the provision of more specialized instructional and/or related services, such as counseling, psychological services, or social-work services in schools. In addition, training of the teacher in effective use of conflict management and/or behavior management strategies also could be extremely effective. In-service. training for all personnel who work with the student, and, when appropriate, other students, also can be essential in ensuring the successful implementation of the above interventions.

QUESTION 2: Does the right to a free appropriate public education extend to children with disabilities who are suspended or expelled?

ANSWER: Yes. A free appropriate public education must be made available to all eligible children with disabilities, including children with disabilities who have been suspended or expelled from school. (Section 612(a)(1))

QUESTION 3: What is the meaning of the phrase "children with disabilities who have been suspended or expelled from school"?

ANSWER: The Department believes that the phrase means children with disabilities who have been removed from their current educational placement for more than ten school days in a given school year.

QUESTION 4: Must educational services be continued during the removal of a child with a disability from his or her educational placement for ten school days or less?

ANSWER: No. The Department does not believe that it was the intent of Congress to require that FAPE be provided when a child is removed for ten school days or less during a given school year.

However there is nothing in The IDEA '97 that would prevent the provision of FAPE during this time.

QUESTION 5: Must there be a manifestation determination before a student with disabilities can be removed from his or her current education placement for a period of ten school days or less during a given school year?

ANSWER: No. The Department does not believe that the statute requires a manifestation determination prior to a removal for a period of ten school days or less in a given school year. However, if an action that involves the removal of a child with a disability from his or her current educational placement for more than ten school days in a given school year is contemplated, the Department believes that a manifestation determination would be required, and the manifestation determination must take place as soon as possible but in no case later than ten school days after the decision to take that action is made. (615(k)(4)(A))

QUESTION 6: Must a functional behavioral assessment be conducted prior to a removal of ten school days or less during a given school year?

ANSWER: No. The Department does not believe the statute requires a functional behavioral assessment, if a child with a disability is removed from his or her current educational placement for ten school days or less in a given school year, and no further disciplinary action is contemplated.

QUESTION 7: Are there any specific actions that a school district is required to take during a removal of a child with a disability from his or her educational placement for ten school days or less?

ANSWER: If no further removal is contemplated, the Department does not believe that other specific actions are required during this time period. However, school districts are strongly encouraged to review as soon as possible the circumstances that lead to the child's removal and consider whether the child was being provided services in accordance with the IEP and whether the behavior could be addressed through minor classroom or program adjustments, or whether the IEP team should be reconvened to address possible changes to the IEP.

QUESTION 8: Does IDEA continue to allow a school district to seek a court order to remove a student with a disability from school or otherwise change the student's placement? If so, under what circumstances?

ANSWER: Yes. IDEA continues to allow a school district to seek to obtain a court order to remove any student with a disability from school or to change the student's current educational placement if the school district believes that maintaining the student in the current educational placement is substantially likely to result in injury to the student or to others. In addition, the new statute allows school authorities to ask a hearing officer to move children with disabilities to an interim alternative educational setting for up to 45 days if they are substantially likely to injure themselves or others in their current placement. The hearing officer may move the child to an alternative educational setting if the public agency demonstrates by evidence that it is more than a preponderance of the evidence that maintaining the child in the child's current placement is substantially likely to result in injury to the child or others. The hearing officer must consider the appropriateness of the child's placement, whether the school district has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services, and determine that the interim alternative educational setting meets the requirements of section 615(k)(3) of the Act.

C. Administrative Agency Opinions

1. Georgetown Indep. Sch. Dist., 28 IDELR 904 (SEA TX 1998) -- Sixth grade student brought a knife to school. The School District suspended him for three days, and then assigned him to an alternative educational placement for 20 days. The alternative placement was appropriate and the School District followed proper IDEA procedural safeguards. The IDEA authorizes school personnel to order a change in the placement of a child with a disability to an appropriate interim educational setting for not more than 45 days if the child carries a weapon to school or a school function. 20 U.S.C. § 1415(k)(1)(A). This provision is an exception to the stay put rule in 20 U.S.C. § 1415(j).

   The IDEA prescribed detailed procedural protections for the student, and the School District complied by holding a timely ARD committee meeting and performing a manifestation determination and a functional behavior analysis, developing a behavior intervention plan, and determining that the alternative placement was an appropriate setting.

2. Akron Central Sch. Dist., 28 IDELR 909 (SEA NY 1998) -- Learning disabled student bought marijuana from another student. After the manifestation committee found no nexus between the conduct and the LD, the committee amended the student's IEP to include alternative educational setting of home schooling for six weeks. However, the IEP team must consider what would be an appropriate interim alternative setting. 20 U.S.C. § 1415(k)(3)(A) and (B). In this case, the amended IEP did not provide for a FAPE because it did not specify that the student would continue to receive services with regard to resource room (transitional support) during the suspension. Also, the school presented no evidence that the instruction provided met the goals in the IEP. 20 U.S.C. § 1415(k)(3)(B)(i). Finally, the school must pay for an IEE to assess the student's substance abuse problems.

3. District of Columbia Pub. Schs., 28 IDELR 401 (SEA DC 1998) -- Grandparent awarded reimbursement for the costs of a private functional behavior assessment (FBA). The IEP team must meet within 10 days of the disciplinary action and develop a plan to rectify the behavior that resulted in discipline. In this case, the school suspended the student and never held the IEP meeting and never performed the FBA. The grandparent had obtained the FBA after the student's fourth day of suspension.

4. Wareham Pub. Schs., 27 IDELR 1176 (SEA Mass. 1998) -- Several months after his expulsion, a regular education student requested evaluation and tutoring. The student was not entitled to any educational services pending completion of the special education evaluation process. This case was decided under the former IDEA; however, the hearing officer stated in dicta that the school district would win if the Reauthorized IDEA were applicable. Specifically, the hearing officer found no evidence that the school had or should have had knowledge of a disability and, as a result, the student should be treated like any other student being expelled for a like offense. The hearing officer held that Congress qualified 20 U.S.C. § 1415(k)(8)(A) and (C), which provide that regular education students may, under certain conditions, assert IDEA protections. The qualification is found in 20 U.S.C. § 1415(k)(8)(C)(ii), which provides that

   > If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under paragraph (1) or (2), the evaluation shall be conducted in an expedited manner .... Pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

   The hearing officer concluded that "[t]his language is rather unclear, however, it appears to apply to regular education children involved with drugs and/or weapons, as well as children who are likely to injure themselves or others, who have been placed in alternative educational settings. These children would continue to receive educational services during the pendency of the expedited TEAM process. This section, however, does not apply to Student, for he was not placed in an alternative educational settings, but was rather, expelled."

5. Dekalb County Sch. Sys., 27 IDELR 761 (SEA GA 1998) -- Student assaulted a classmate, and the school district sent him to an alternative school. The hearing officer upheld this placement, rejecting the parents' assertions that the school was too strict.

6. Smith County Sch. Sys., 27 IDELR 764 (SEA Tenn. 1998) -- The manifestation meeting was timely because it was held within the required 10 school days of the student's misconduct. In any event, the manifestation meeting was not required because the student had not been suspended for more than 10 days at the time of the misbehavior that lead to the manifestation meeting. Also, the parents could not argue that the district violated the stay put rule when it suspended the student after the parents requested a due process hearing, as no change of placement had occurred.

7. Oxford City Sch. Bd., 27 IDELR 673 (SEA Ala. 1998) -- The school expelled a regular education student. Student sought due process, alleging she was eligible for special education services. Evaluations conducted before and after the expulsion failed to reveal any disability. The student had been successful in an alternative school and demonstrated academic and social capabilities. There was no reliable evidence to suggest a disability.

8. Oconee County Sch. Sys., 27 IDELR 629 (SEA GA 1997) -- An ADHD/OHI student brought a gun to school and was sent to an alternative school for 45 days. The manifestation team found that the incident was unrelated to the ADHD, because poor judgment is not a diagnostic criteria for ADHD. Even if it were, the student admitted that he had considered the consequences of his actions on several different occasions as he debated whether or not he should have the gun at school.

ROWLEY AS THE PIVOTAL DECISION

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I. Introduction and Brief Overview: "The Pendulum Swings Towards Access"

- 1960 – The Era of Rapid Change Begins
- 1968-1972 – Case Law Gathers Momentum
- Equal Access to Educational Opportunities Stressed
- Continuum of Educational Placements and Services Stressed
- Regular Education Placements Preferred (Inclusive, Comprehensive Services Model Emerges)
- Increased Involvement of Courts Accelerates
- Discipline Emerges As a Major Issue [Stuart v. Nappi (1978), Doe v. Koger (1979), S-1 v. Turlington (1982), et. al]
- Honig (1988) – alternatives Suggested, Removal Possible

II. Board of Education v. Rowley (1982): "The Pendulum Swings Back Toward Center"

- Rowley As Pivotal Decision
- Unique Needs of Individual Student Must Dictate
- Specific Benefits to Individual Student
- No Specific Level of Benefit Mandated by Law
- The "Best" Is Not Required
- Maximizing Potential of Student Is Not Required
- Regular Education Placements Preferred But Not Mandated
- LRE Exists on Continuum
- Placements Exist on Continuum

III. The Riley (1997) Philosophy Revisited: "The Catalyst Is Added"

- Qualified Right of Access
- Disruptive Behavior
- Dangerous and/or Criminal Conduct (Weapons and Drugs)
- Direct-Threat Analysis and School Safety
- Individual Assessments of Student and Situation
- Possible Exclusion from School and School-Sponsored Activities
- Possible Forfeiture of All Benefits
- Possible Interim Alternative to Regular Education Setting
- Possible Return to Current Placement

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IV. Five Basic Attitudes Expressed in Riley (1997): "An Emerging Judicial Philosophy?"

- Every Student Is Accountable for His/Her Behavior
- Student Discipline Must Be Swift and Consistent
- Students and Staff Must Have a Safe and Disruption-Free Environment
- Students Who Present Serious and Actual Threats of Harm Must Be Dealt with Immediately
- Dysfunctional Behavior Must Be Remedied Before a Student Returns to Current Placement

IV. Student Discipline and Control, 1998, Post-IDEA Reauthorization

- Student and Staff Safety
- "Zero-Tolerance"
- Dealing with Disruptive, Dangerous, and Aggressive Students
- Direct threat Analysis
- Immediate Removal and "Stay-Put" Provision: "Stay-Put" Is Not Forever
- Behavioral Manifestation Determinations Are Key
- Expedited Hearings
- Suspensions and Interim Alternative Educational Placements Necessary
- Tougher State Laws (School Law and Juvenile Law)
- Increased Involvement of Police in School Discipline (Within the School)
- Student-on-Student Harassment and Administrative Liability

ACADEMIC FREEDOM IN CLASSROOM INSTRUCTION: THE MYTHS AND THE REALITIES

Presented at the

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by

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Scenarios to be Discussed at the Concurrent Topic Session

K-12 Scenario: The day after a fatal shooting at a school in another state, a high school mathematics teacher who was deeply troubled by the incident spent the first half of each class period discussing with her students the problems of violence in society and the feasibility of gun control. The math teacher was employed in a rural community in a western plains state where guns and hunting were part of the culture. These class discussions raised some controversy in the community and incurred the displeasure of the superintendent and the school district board. If school officials move to impose sanctions on the teacher, will she be protected by academic freedom?

Higher Education Scenario: An English professor at a state university established a computer listserve for each of his classes that students could access via E-mail. He had on occasion used some rather nontraditional instructional methods to convey his points in class. To illustrate that taboo words lose their power if used to excess, he posted on his listserve a piece of "rap" style poetry that included extensive use of the "N" word. Many on campus found this to be very offensive, and some suggested that university officials take punitive measures against the professor. Is this use of the listserve protected by academic freedom?

I. Introduction and Context

A. The principle of academic freedom in classroom instruction is part of the culture of American education. But what are the legal contours of this principle? And, what protections are actually enjoyed by educators in their classrooms? Finally, are there distinctions between higher education and K-12 education?

B. Ringing endorsements of the general concept of "academic freedom" are found in numerous cases decided by the Supreme Court.

1. The essentiality of freedom in the community of American universities is almost self-evident. . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

2. Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us, and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

3. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506 (1969).

B. Academic institutions enjoy an "academic freedom" that is in some ways at odds with an instructor's academic freedom in the classroom.

1. It is the business of a university to provide an atmosphere most conducive to speculation, experiment and creation, an atmosphere in which prevail "the four essential freedoms" of a university--to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." [Emphasis added] *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (Frankfurter, J., concurring in result).

2. Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself. [citations deleted] *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n. 12 (1985).

C. Governing boards and administrators have authority to exercise reasonable control over curriculum, instruction, and other educational activities.

1. [L]ocal school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political. *Board of Educ. of Island Trees Sch. Dist. v. Pico*, 457 U.S. 853, 869 (1982) (Brennan, J., plurality opinion)

2. Public schools typically are not "public forums," and school officials may impose reasonable restrictions on the speech of students, *teachers*, and other members of the school community. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988)(emphasis added).

II. Notes from Higher Education Cases

A. Curriculum Content

1. Although academic freedom is a right protected by the First Amendment, it is not a license for uncontrolled expression; thus, a state university instructor had no First Amendment right to override the wishes and judgment of his superiors and fellow faculty members as to his overemphasis on sex in his health survey course and the inadvisability of engaging in extensive personal counseling of students. *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973).

2. Termination of a tenured junior college teacher's contract for not following the college's curriculum plan for English courses did not infringe on his constitutional right of freedom of speech and expression. *Saunders v. Reorganized Sch. Dist. No. 2,* 520 S.W.2d 29 (Mo. 1975).

3. Controversy over content of classroom discourse in "The Politics of Race" course that linked Zionism with Nazism and apartheid ("All three forms of racism will be discussed for comparative purposes; e.g., Nazism, apartheid, and Zionism.") would not be a constitutionally permissible basis for denying tenure to an assistant professor at a state university. *Dube v. State Univ. of New York*, 900 F.2d 587 (2nd Cir. 1990) *cert. denied*, 111 S. Ct. 2814.

4. Associate professor in a state university law school could not be denied tenure for advocating the legalization of marijuana and criticizing national drug control policy in his First Amendment class or in campus publications; on its face, such speech implicates matters of public concern and is protected by the First Amendment. *Blum v. Schlegel*, 18 F.3d 1005 (2nd Cir. 1994).

5. Classroom speech concerning diversity issues by an instructor in a graduate school of business related to a matter of public concern; when applying the *Pickering* balance test, however, his use of certain materials for classroom discussion was found to disrupt the school's pedagogical mission, and thus was not protected by the First Amendment. *Scallet v. Rosenblum*, 911 F. Supp. 999 (W.D. Va. 1996).

B. Instructional Methods

1. Whatever may be the ultimate scope of the amorphous "academic freedom" guaranteed our Nation's teachers and students, it does not encompass the right of a nontenured teacher at a state university to have her teaching style insulated from review by her superiors who were displeased with her "pedagogical attitudes" when they determined whether or not she merited tenure. *Hetrick v. Martin*, 480 F.2d 705 (6th Cir. 1973), *cert. denied*, 414 U.S. 1075 (1973).

2. Refusal of a nontenured art professor at a state university to assign a grade as directed by the head of the department was not a "teaching method" protected by academic freedom. *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547 (5th Cir. 1982), *cert. denied*, 457 U.S. 1106 (1982).

3. A nontenured faculty member's claim that his refusal to inflate his grades or lower his expectations and standards was a form of academic freedom protected by the First Amendment must be separated into his advocacy for change, which was protected, and his refusal to change his standards, which was not. *Lovelace v. Southeastern Mass. Univ.*, 793 F.2d 419 (1st Cir. 1986).

4. Because the assignment of a letter grade is symbolic communication, university officials violated a professor's First Amendment right to academic freedom when they ordered him to change a student's grade; however, it would have been constitutionally permissible for them to change the grade administratively. *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989).

5. Community college administrators violated First Amendment rights of a teacher and a student by cancelling a drama class because of community opposition to a play to be performed by the students in the class. *DiBona v. Matthews*, 269 Cal. Rptr. 882 (Cal. App. 1990).

6. A university instructor's statements in a technical writing class, which had sexual overtones and which some students found offensive, were not statements on matters of only personal interest but were made for the legitimate pedagogical, *public* purpose of conveying certain principles related

to the subject matter of the course, and thus were protected by the First Amendment. The university's sexual harassment policy as applied to an instructor's classroom speech was not reasonably related to the legitimate pedagogical purpose of providing a congenial academic environment, because it employed an impermissibly subjective standard that failed to take into account the nation's interest in academic freedom. *Silva v. University of New Hampshire*, 888 F. Supp. 293 (D. N.H. 1994).

7. The dismissal of a coach for using the word "nigger" with players on his university basketball team did not violate his First Amendment rights to either free speech or academic freedom; his use of the word in a locker room speech was done only to motivate his players and was not intended to be on a matter of public concern, and thus was not constitutionally protected. *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

8. An English teacher at a community college was disciplined under a newly-adopted sexual harassment policy for using language in the classroom that some students found offensive; however, college officials violated his First Amendment rights by punishing him without notice that the policy would be applied to teaching methods that he had used for many years. *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996).

C. Other Classroom Speech

1. A professor has a constitutionally protected right to simply inform his students in his classes of his personal political and philosophical views, and a state university could not decide to not reappoint a nontenured assistant professor for announcing to his classes in world civilization and in American civilization that he was a communist and a member of the Progressive Labor Party. *Cooper v. Ross*, 472 F. Supp. 802 (E.D. Ark. 1979).

2. A political science professor in a community college stated a claim in alleging that his First Amendment rights to freedom of speech and academic freedom were chilled by a letter from the president directing him not to discuss "current controversial college matters" in his classroom; the professor alleged that the president objected to his classroom discussions, not because of concerns about curriculum or teaching method, but to silence him about an idea with which the administration did not agree. Whether the state interest in restricting such classroom speech was sufficient to overcome any operative First Amendment rights could only be determined by a full examination of the facts. *Mahoney v. Hankin*, 593 F. Supp. 1171 (S.D. N.Y. 1984).

3. The Constitution does not protect a teacher's abusive use of profanity not

germane to the subject matter in a public college classroom. *Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986).

4. A university requirement that a professor have her students complete course evaluation forms did not violate her First Amendment right to academic freedom, even though the use of such forms was contrary to her theory of education. *Wirsing v. Board of Regents of Univ. of Colo.*, 739 F. Supp. 551 (D. Colo. 1990), *aff'd*, 945 F.2d 412.

5. A professor's educational judgment can be questioned and redirected by the university when he is acting as a course instructor, but not when he acts as an independent educator or researcher; in disputes over course content, the institution prevails. Thus, university authorities could direct a professor to refrain from expressing his religious viewpoints in the classroom and like settings; however, if a student were to ask about his views he could fairly answer the question. *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied* 112 S. Ct. 3026 (1992).

6. Demotion in rank and salary for writing demeaning letters to a student, demanding an apology from her, and assigning an unjustified grade of "F" did not violate a university faculty members's First Amendment rights or academic freedom; no matters of public concern were implicated either by his letters to the student or by the grade he gave her for not apologizing. *Keen v. Penson*, 970 F.2d 252 (6th Cir. 1992).

7. Academic freedom is not an independent First Amendment right; rather, it is a type of speech and a special concern of the First Amendment. Because a professor's offensive and inappropriate classroom comments, which were found to constitute sexual harassment, were not speech on a matter of public concern, they were not protected by the First Amendment. *Rubin v. Ikenberry*, 933 F. Supp. 1425 (C.D. Ill 1996).

III. Notes from K-12 Education Cases

A. Curriculum Content

1. "Academic freedom" protected the tenured teacher of a senior English class from being dismissed for assigning an article that included "a vulgar term for an incestuous son" and then discussing the article and the word in class; furthermore, he had no adequate notice that this conduct would be prohibited. *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969).

2. Because school officials failed to show either that a short story with some vulgar terms was an inappropriate assignment for high school juniors or that

it created a significant disruption to the educational process, an English teacher's dismissal for making this assignment was an unwarranted invasion of her First Amendment right to academic freedom. *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970).

3. A high school teacher was denied the proper exercise of his right of free speech when he was discharged for discussing controversial political and social issues in his political science and civics classes. *Sterzing v. Fort Bend Indep. Sch. Dist.*, 376 F. Supp. 657 (S.D. Tex. 1972), *vacated and remanded on issue of appropriate remedy*, 496 F.2d 92 (5th Cir. 1974).

4. Teachers' claim that their dismissals for distributing to eighth grade students a brochure with an inappropriate poem violated their right to academic freedom failed; the reach of the First Amendment does not extend so far that the school board had to tolerate the distribution of obviously inappropriate material. *Brubaker v. Board of Educ. of Sch. Dist. 149, Cook Cnty.*, 502 F.2d 973 (7th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975).

5. Public school teachers undoubtedly have some freedom in the techniques to be employed, but they do not have an unlimited liberty protected by the First Amendment to discuss controversial subjects and to use controversial materials in their courses, at least at the secondary school level. *Adams v. Campbell County Sch. Dist.*, 511 F.2d 1242 (10th Cir. 1975).

6. Teachers do have some rights to freedom of expression in the classroom, and they cannot be made to simply read from a script prepared or approved by the board; however, no "right of academic freedom" prevents a board from deleting 10 books from a reading list including 1,275 other titles approved for use in high school language arts courses. *Cary v. Board of Educ. of Adams-Arapaho Sch. Dist. 28-J*, 598 F.2d 535 (10th Cir. 1979).

7. A probationary Kindergarten teacher had no constitutional right to disregard the prescribed curriculum concerning patriotic matters, on the claimed grounds that conforming to the curriculum would conflict with her religious principles. *Palmer v. Board of Educ. of Chicago*, 603 F.2d 1271 (7th Cir. 1979).

8. After public protests about the content of his seventh grade life science course, a teacher was suspended, then discharged, even though the school board had approved the textbook and the principal had approved the films. The teacher's exercise of academic freedom had followed rather than violated his superior's instructions, and his First Amendment rights were infringed by the adverse personnel actions. *Stachura v. Memphis Comm. Sch. Dist.*, 763 F.2d 211 (6th Cir. 1985), *reversed and remanded on issue of damages*,

477 U.S. 299 (1986).

9. A tenured high school teacher had no First Amendment right to use a book that school officials would not approve for use in teaching a unit on homosexual rights in his American Minorities course. *Fisher v. Fairbanks North Star Borough Sch. Dist.*, 704 P.2d 218 (Alaska 1985).

10. A teacher's First Amendment rights encompass the notion of "academic freedom" to exercise professional judgment in selecting topics and materials for use in the educational process; however, a teacher's showing of a film containing violence and nudity to high school classes on a noninstructional day was not done to convey any message and thus did not constitute expression protected by the First Amendment. *Fowler v. Board of Educ. of Lincoln County*, 819 F.2d 657 (6th Cir. 1987).

11. The denial of a teacher's motion for a preliminary injunction involved balancing her First Amendment rights to classroom expression and the school's right to control curriculum; because of the extent of the vulgarity and sexual explicitness in a film that the teacher showed to her high school English class, she was unlikely to be able to demonstrate that the decision to not renew her contract was unreasonable. *Krizek v. Board of Educ. of Cicero-Stickney Twnshp. H.S. Dist. No. 201*, 713 F. Supp. 1131 (N.D. Ill. 1989).

12. The First Amendment did not empower a public high school history teacher to use his own supplemental reading list, instead of the list approved by school officials. The inquiry here did not advance to a balancing of the interests of the teacher and the interests of the school, because the teacher's use of his separate reading list was not a matter of public concern. *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990).

13. Given the school board's important pedagogical interest in establishing curriculum and legitimate concern with possible Establishment Clause violations, its prohibition on the teaching of "creation science" to junior high students was appropriate and did not violate the teacher's First Amendment rights. *Webster v. New Lennox Sch. Dist.*, 917 F.2d 1004 (7th Cir. 1990).

14. A school district requirement that a high school biology teacher teach the theory of evolution was not a violation of his First Amendment rights. *Peloza v. Capistrano Unified Sch. Dist.*, 782 F. Supp. 1412 (C.D. Cal. 1992).

15. A high school teacher did not have a First Amendment right to participate in the makeup of the curriculum through the selection of a controversial play

to be performed by students in her advanced acting class. Neither the selection of the play by the teacher nor the editing of the play by the principal presented a matter of public concern; thus, this situation was nothing more than an ordinary employment dispute. *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998), *petition for cert. filed*, (No. 97-1835).

B. Instructional Methods

1. A teacher of eleventh-grade English was discharged for writing the "F" word on the chalkboard as an example of a "taboo" word. Although not clear whether or not this teaching methodology was protected by the concepts of free speech and academic freedom, procedural due process required that the teacher could not be discharged unless the state could prove that he had reasonable notice, either by regulation or otherwise, that he should not use that method. *Mailloux v. Kiley*, 323 F. Supp. 1387 (D. Mass. 1971), *aff'd*, 448 448 F.2d 1243 (1st Cir. 1971).

2. A high school economics teacher, who implemented a philosophy that allowed students to make many decisions about subjects for daily discussion, course materials, and classroom rules, was dismissed for insubordination; her "academic freedom" claim failed because she had no constitutional right to persist in a course of teaching behavior that contravened her employers valid dictates regarding appropriate classroom methods or content. *Ahern v. Board of Educ. of the Sch. Dist. of Grand Island*, 456 F.2d 399 (8th Cir. 1972).

3. A high school drama teacher was exercising academic freedom by employing methods of teaching reasonably relevant to the subject matter she taught, and the Constitution protected her from dismissal for choosing plays that included scenes with drinking and profanity, when there were no school rules or other prior notice that such plays were not allowed. *Webb v. Lake Mills Comm. Sch. Dist.*, 344 F. Supp. 791 (N.D. Iowa 1972).

4. A teacher had no right, under the principle of academic freedom or any other theory, to require eleven-year-old girls to write a very vulgar word repeatedly and in the presence of their classmates as a form of punishment. *Celestine v. Lafayette Parish Sch. Bd.*, 284 So. 2d 650 (La. App. 1973).

5. The act of teaching is a form of expression, and the methods used are media; a high school teacher's use of outside speakers in his political science class was his medium for teaching, and thus protected by the First Amendment. An order issued by a board of education banning "all political speakers" was not a reasonable restriction of the teacher's protected expression. *Wilson v. Chancellor*, 418 F. Supp. 1358 (D. Or. 1976).

6. A public school teacher has a First Amendment right to academic freedom to use a teaching method of his or her own choosing, even though the subject matter may be controversial and sensitive. Thus, a teacher could not be dismissed for using in her high school speech and psychology classes a survey from a magazine that included items about sexually explicit matters. *Dean v. Timpson Indep. Sch. Dist.*, 486 F. Supp. 302 (E.D. Tex. 1979).

7. Although teachers should have some measure of freedom in teaching techniques employed, course content and coverage is manifestly a matter within a school board's discretion. Because high school teachers' method of team teaching history affected course content, restrictions imposed did not violate their right to academic freedom. *Millikin v. Board of Dir. of Everett Sch. Dist. No. 2*, 611 P.2d 414 (Wash. 1980).

8. A nontenured American history teacher could not be dismissed for using a simulation technique that evoked strong student feelings on racial issues to teach about the Reconstruction period; classroom discussion is protected by the First Amendment, and the discharge could not be upheld absent a finding that the controversial discussions overbalanced her usefulness as a teacher. *Kingsville Indep. Sch. Dist. v. Cooper*, 611 F.2d 1109 (5th Cir. 1980).

9. Academic freedom, analyzed as freedom of speech, protected a special needs teacher in a junior high school from adverse employment actions for having discussed with three male students in a resource room a number of vulgar words with multiple meanings. School officials contended that she had used bad judgment; however, the discussion of the words was pedagogically valid, and she had in fact admonished the students not to use such words. *Hosford v. School Comm. of Sandwich*, 659 N.E.2d 1178 (Mass. 1996).

10. The prohibition of a teacher's use in her classrooms of a certain game as a motivational technique was not in violation of the First Amendment; high school classrooms are nonpublic fora, and the school's restriction on teacher's speech satisfied the test of reasonableness. *Murray v. Pittsburgh Bd. of Pub. Educ.*, 919 F. Supp. 838 (W.D. Pa. 1996).

C. Other Classroom Speech

1. A probationary art teacher enjoyed constitutional protections such that she could not be dismissed for refusing to comply with a school regulation that required her to participate with her class in the pledge of allegiance. *Russo v. Central Sch. Dist. No. 1*, 469 F.2d 623 (2nd Cir. 1972), *cert. denied*, 411 U.S. 932 (1973).

2. Given Establishment Clause considerations, the school district's removal

of two Christian books from classroom shelves and a directive ordering a teacher to cease his silent Bible reading in the classroom did not violate his First Amendment rights. *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992).

3. For First Amendment purposes, a teacher's expression in a traditional classroom setting must be treated as school-sponsored expression in a nonpublic forum; thus, the teacher of a ninth-grade government class had no constitutional right--based on academic freedom or anything else--that protected his substantiation in class of a rumor about inappropriate student behavior. *Miles v. Denver Pub. Schs.*, 944 F.2d 773 (10th Cir. 1991).

4. Because a teacher's refusal to assign a grade as instructed by his superiors is not a teaching method, it is neither a principle of academic freedom nor a matter of public concern. Thus, adverse employment actions imposed on a high school mathematics teacher for refusing to assign an athlete a grade was not a violation of his First Amendment rights. *Bates v. Dallas Indep. Sch. Dist.*, 952 S.W.2d 543 (Tex. Ct. App. 1997).

IV. General Notes from Classroom Expression Cases

A. The Supreme Court has recognized a university's institutional right to academic freedom. *Miles v. Denver Pub. Schs.*, 944 F.2d 773 (10th cir. 1991).

B. Though we are mindful of the invaluable role academic freedom plays in our public schools, particulary at the post-secondary level, we do not conclude that academic freedom is an independent First Amendment right. *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 3026 (1992).

C. Secondary teachers do not have a First Amendment right to determine what instructional materials to use; that control is placed with school boards. *Fisher v. Fairbanks North Star Borough Sch. Dist.*, 704 P.2d 213 (Alaska 1985).

D. Although the concept of academic freedom has been recognized in our jurisprudence, it has never conferred on teachers the control of public school curricula. *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990).

E. No court has found that public school teachers' First Amendment rights extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dicatates. Although teachers' out-of-class conduct, including their advocacy of particular teaching methods, is protected by the Constitution, their inclass pedagogical method is not protected by academic freedom. *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172 (3rd Cir. 1990).

F. The asserted academic freedom of a professor can conflict with the academic freedom of the university regarding that professor; however, in matters of curriculm content the academic institution is supreme. *Keen v. Penson*, 970 F.2d 252 (7th Cir. 1992).

G. College administrators are not afforded the same broad discretion in controlling curriculum as are school administrators at the elementary and secondary level, and the rationale underlying the "school sponsorship" rule does not extend with the same force at the college level as at the elementary and secondary level. *DiBona v. Matthews*, 269 Cal. Rptr. 882 (Cal. Ct. App. 1990).

H. While communities have a legitimate interest in attempting to inculcate certain values in students through public education, achieving some sort of uniform value system is not part of the mandate of higher education. Indeed, it is anathema to the intellectually maverick environments of the university and graduate school. Thus, the pedagogical interest in restricting a teacher's in-class speech is not as strongly implicated in the context of higher education. *Scallet v. Rosenblum*, 911 F. Supp. 999 (W.D. Va. 1996).

I. The analysis of what constitutes a matter of public concern and what raises academic freedom concerns is essentially the same. Thus, the linchpin of the inquiry, for both public concern and academic freedom, is the extent to which the speech advances an idea transcending personal interest or opinion that impacts our social and/or political lives. *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

J. During instructional periods, a college classroom is reserved for its intended purpose--teaching a particular course for credit-- and thus is not a public forum. *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 3026 (1992).

K. A school district classroom is not a public forum; thus, school officials may regulate a teacher's classroom speech if: (1) the regulation is reasonably related to a legitimate pedagogical concern; and (2) the school provided the teacher with notice of what conduct was prohibited. Whether a regulation is reasonably related to legitimate pedagogical concerns will depend on, among other things, the age and sophistication of the students, the relationship between teaching method and valid educational objective, and the context and manner of presentation. As to the adequacy of notice of what is proscribed, it is not required that a school must expressly prohibit every imaginable inappropriate conduct by teachers; the relevant inquiry is whether, based on existing regulations, policies, discussions, and other forms of communication between administrators and teachers, was it reasonable for the school to expect the teacher to know that the conduct at issue was prohibited? *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993).

ACADEMIC FREEDOM AND CURRICULUM CONTROL

D.3 Academic Freedom in Classroom Instruction: The Myths & Realities

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ACADEMIC FREEDOM AND CURRICULUM CONTROL

In the liberating spirit of the times, the United States Supreme Court recognized the constitutional protection of academic freedom when, in 1967, it declared that "the First Amendment does not tolerate laws that cast a pall of orthodoxy over the classroom."[1] However, in the decades that followed, the courts have seen the need to define limits to academic freedom which reflect an ongoing attempt to strike a balance between the teacher's right to free expression and community control of public education. With this in mind, the legal parameters which circumscribe academic freedom should be a pivotal part of teacher education programs. Teachers must not only understand what and how they are to teach, they must also understand the limits of their control over the style and substance of their teaching. By virtue of state and federal constitutions, as well as case law, a hierarchy of control has evolved with respect to the style and substance of classroom teaching, and it is essential that teachers be aware of their roles within that hierarchy and the parameters which limit academic freedom. A nebulous understanding of the concept of academic freedom can give teachers a sense of control that is inaccurate and dangerous both for them and their students. On the other hand, a tacit assumption of no control can silence valuable and needed professional input. In reality, a teacher's control of classroom substance and style is situational and

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[1] Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

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determined by law and the judicial interpretation of law in similar situations. While a teacher's right to academic freedom has been generally recognized, this right is not absolute and must be balanced against society's competing interests.

Academic freedom is alive and well, but teachers wishing to use it must learn to anticipate its limits by awareness of the legal history which has come to define the limits of the concept. This paper will explore some of the factors found in case law which have defined the limits on a teacher's academic freedom.

The Hierarchy of Control

Control of public education, by virtue of the Tenth Amendment, is one of the powers reserved to the states.[2] Therefore, the nature and extent of instructional programs offered in public schools are, to a large extent, determined by the educational laws of individual states. Each of the fifty states provides for public education in the state constitution, and each has created a department of education to administer the policies and procedures which evolve from educational legislation arising at both the state and federal levels. The State Board of Education, in conjunction with the State Department of Education, prepares and disseminates the regulations that delineate the form and substance of the curriculum to be implemented in district schools. Local boards of education, however, are delegated operational power and responsibility for actually implementing state curriculum requirements and policies at the local level. It is the job of the local board to adapt the state's legislated curriculum requirements and policies to the educational goals and budgetary ability of the community. Ultimately, it is the responsibility of the local board of education to implement the state-mandated curriculum in the classroom.

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[2] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

This curriculum is potentially one of the major instruments of political socialization.[3] Curriculum is a powerful tool, and its potential impact has made curriculum control the focus of extensive litigation in the field of education. A study conducted by Edgar Litt found that the curriculum did affect the kinds of political values developed by students.[4] The influence was accelerated when values taught were in harmony with those articulated by other socialization agents; the curriculum was less effective when the values taught differed from the norms of other, more powerful, agents of political learning.[5] In view of this study it is easy to understand why those directly involved in education -- the State, the community, parents, and teachers -- often find themselves vying for control of the curriculum. The litigation history of this struggle provides vital background information to guide a teacher's understanding of where curricular control may finally vest.

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[3] M. Yudof, D. Kirp, T. van Geel, B. Levin, Educational Policy and the Law 184 (1987).

[4] See E. Litt, *Civic Education, Community Norms and Political Indoctrination*, 28 Am. Soc. Rev. 9 (1963). (". . . . All school systems carry on some form of political indoctrination. The myths and legends from the past, the policies and programs of the present, and the goals and aspirations of the future are taught selectively. Consciously or not, textbooks and other teaching materials justify and rationalize political practices.")

With respect to the teacher's role in shaping the curriculum, The American Civil Liberties Union has said the following:

> The professional staff, by virtue of its training and experience, has the right and responsibility to establish the curriculum, subject to the approval of boards of education and state departments of education. It is expected that members of the staff will be guided at all times by the highest professional standards of scholarship and methodology, applied with an appropriate sensitivity to the community's educational needs and the expressed views of its citizens. Their professional preparation, however, qualifies them to establish what shall be included in the curriculum and when and how it shall be taught, free from dictation by community groups or individual citizens.[6]

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[5] *Id.*

[6] American Civil Liberties Union, Academic Freedom in the Secondary Schools 7 (1971).

Those arguing that teachers' professionalism should entitle them to control their own work product have compared teachers to physicians and attorneys.[7] Needless to say, however, neither this view nor that of the ACLU prevails. Such arguments generally fail to note that the archetypal professional is an independent contractor who sells his skills or work product to clients on the open market.[8] This, of course, is not true of public school teachers, who are dependent on the government for their salaries.[9] Further, education is governed by hierarchical bureaucracies and not by the profession itself.[10] This dependence is acknowledged even in the forceful statement of the Civil Liberties Union supporting teacher control of the curriculum "subject to the approval of boards of education and state departments of education".[11] Teachers work with a captive audience whose interests are tied to those of the community and entrusted to the care of local and state boards of education. Students in public school classrooms have not freely chosen to be there, and it can be argued that they should not be required to receive or embrace a curriculum biased by the teacher, an employee of the local board of education.

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[7] *See* Jones, *The American Concept of Academic Freedom*, in Academic Freedom and Tenure 224, 233 (L. Joughin Ed. 1969).

[8] *See* Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 24 U. of Pa. L. Rev. 6, 1337 (1976).

[9] *Id.*

[10] Halligan, *The Function of Schools, the Status of Teachers, and the Claims of the Handicapped: An Inquiry into Special Education Malpractice,* 45 Mo. L. Rev 667 (1980).

[11] *See* American Civil Liberties Union, *supra* note 4, at 7.

Those who choose material included in the curriculum and methods for implementing that curriculum make value judgments concerning the proper allocation of societal resources. Neither as individuals, nor as part of a group, however, do teachers have prior training and experience which uniquely equips them to make such judgments for society.[12] It is argued that these are decisions based on political considerations to be made in the context of the employing community. The influence of role expertise, as opposed to political influence, in the determination of curriculum and method, is a pivotal issue in curriculum control litigation. Other equally vital issues include choice of the value system by which students are socialized, and responsibility of the teacher for disseminating a curriculum based on a value system in conflict with the teacher's own.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[13]

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[12] *See* Goldstein, *supra* note 8, at 1338.

[13] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. Const. amend. I.

This Amendment applies to the states by virtue of the incorporation clause of the Fourteenth Amendment.[14] In this context public schools perform two vital societal functions. First, a public school system strives to develop inquisitive minds and independent thought.[15] Second, a public school system provides intellectual and moral guidance, and transmits the mores of the community.[16] It is obvious that these functions can be conflict. The second function justifies the imposition of limitations on teachers' classroom expression, but the first cannot be achieved unless individual teachers are given some measure of academic freedom.[17] Thus, limitations placed on teacher freedom of expression must themselves be limited. Ultimately, application of the First Amendment to classroom settings requires the courts to balance these two functions and to say how far schools may go in restricting teachers' expression in the classroom.[18]

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[14] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

[15] *See Academic Freedom in Public Schools: The Right to Teach*, 48 N.Y.U. L. Rev. 1176, 1189 (1973).

[16] Zykan v. Wassau Community Sch. Corp., 631 F.2d 1305 (7th Cir. 1980).

[17] Krizek v. Bd. of Educ. of Cicero-Stickney Twp., 713 F.Supp. 1131 (N.D. Ill. 1989).

[18] *Id.* at 1138.

Teachers, like all other citizens, do have rights of free expression protected by the Constitution, and these rights have been repeatedly upheld by the courts. In Tinker v. Des Moines Independent Community School District, for instance, the Supreme Court said that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[19] These constitutional protections are unaffected by the presence or absence of tenure under state law.[20] Two types of cases have arisen involving teachers' expression in the classroom. The first type involves teacher challenges to rules regarding curriculum content or method of implementation promulgated by the school administration. The second type involves appeals by teachers who have been disciplined for expressing their views with respect to curricular content or method in the classroom, despite the fact that the expression in question violated no specific rule.[21] In each instance questions of clarity, notice, and pedagogical purpose are at issue. This paper will discuss the federal and Supreme Court decisions made in each type of case, and will attempt to isolate some basic rules to guide teachers in determining the measure of control they have over the curriculum.

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[19] Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969).

[20] McLaughlin v. Tibendis, 398 F.2d. 287 (7th Cir. 1968); **see also** Johnson v. Branch, 364 F.2d. 177 (4th Cir. 1966).

[21] Krizek, 713 F.Supp. at 1138.

WHAT CAN (AND SHOULD) A SCHOOL DISTRICT DO TO CREATE SAFE SCHOOLS?

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1. Don't forget the basics

    A. Right to Due Process: Wood v. Strickland, 420 U.S. 308 (1975); Goss v. Lopez, 419 U.S. 565 (1975); Honig v. Doe, 484 U.S. 305 (1988)

    B. Section 504 of the Rehabilitation Act; Gun Free Schools Act of 1994; 1997 IDEA amendments

    C. Exhaustion of administrative remedies Doe v. Board of Education of the Elyria City Schools, 28 IDELR 286 (6th Cir. 1998)

    D. State Law: who suspends? who expels?
    Off-school grounds behavior? Kyle Packer v. Board of Education of the Town of Thomaston, --- Conn. --- (Conn. 1998)
    Prior disciplinary record?

    E. School district discipline policy; when does the school call the police?

    F. Representation for students

2. Documentation

    A. Referrals, evaluations

    B. Individual student discipline records

    C. Individual discipline plans, IEP behavior goals

    D. Incident reports: what actually happened? Threatening v. First Amendment Lovell v. Poway Unified school District, 90 F.3d 367 (9th Cir. 1996)

    E. Confidentiality 1994 FERPA amendments; 1997 IDEA amendments Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile Justice Programs, U.S.

Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention

F. Specific notice to Parent

3. Coordination between discipline staff, regular staff, support service staff and special education staff

A. Does the whole staff knows the same rules?

B. Sharing IEPs and individual discipline plans

C. Manifestation determinations:
Osborne, A.G. Making the Manifestation Determination When Disciplining a Special Education Student, 119 Ed. Law Rep. [323] (Sept. 4, 1997) also in ELA Notes, Vol. 33 No. 6, June/July 1998, p. 6-10.
Majestic, A.L. and Smith, T. Suspending Students with Disabilities: Determining Causation. EDLAW Briefing Paper, Vol. VI, No. 1 May, 1996
See also many OCR rulings in IDELR

D. Program and placement changes Morgan v. Chris L., 25 IDELR 227 (6th Cir. 1997)

E. What about non-special education students claiming special education eligibility after a disciplinary intervention? Hacienda La Puente Unified School District of Los Angeles v. Honig, 19 IDELR 150 (9th Cir. 1992); Rodiriecus L. v. Waukegan School District, 24 IDELR 563 (7th Cir. 1996)

F. Searches Thompson v. Carthage School District, 87 F.3d 979 (8th Cir. 1996); Jenkins v. Talladega City Board of Education, 115 F.3d 821 (11th Cir. 1997)

G. Drug tests Todd v. Rush County Schools, 1998 WL 7352 (7th Cir. 1998)

4. Preparing to win expulsion hearings

Who will tell the story? school administrator, arresting police officer, teachers, students; hearsay problems; documentary evidence; legal representation.

5. Placement pending appeal

A. IDEA requirements
Behavior NOT a manifestation of disability: Doe v. Board of Education of Oak Park & River Forest High School, 25 IDELR 1201 (6th Cir. 1997)

Mehfoud, K.S. and Osborne, A.G., Making a Successful "Interim" Placement Under the IDEA, 124 Ed.Law Rep. [7] (1998), also ELA Notes, Vol. 33 No. 7, August 1998, p. 3-6.

B. Suspension, homebound instruction, instruction at a neutral site

6. Settlement negotiations: remember, we prefer to educate students and see them graduate from high school!

A. How to look firm and fair

B. Shorter expulsions, conditions on return to school, support services for non-special education students

IDEA 1997 amendments concerning discipline
20 U.S.C. 1415(k) Placement in Alternative Educational Setting
(1) *Authority of School Personnel.*
(A) School personnel under this section may order a change in the placement of a child with a disability -
    (i) to an appropriate interim alternative setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives would be applied to children without disabilities); and
    (ii) to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days if -

(I) the child carries a weapon to school or to a school function under the jurisdiction of a State or local education agency; or

(II) the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a State or local education agency.

(B) Either before or not later than 10 days after taking a disciplinary action described in subparagraph (A) -

(i) if the local educational agency did not conduct a functional behavior assessment and implement a behavioral intervention plan for such child before the behavior that resulted in the suspension described in subparagraph (A), the agency shall convene an IEP meeting to develop an assessment plan to address that behavior; or

(ii) if the child already has a behavior intervention plan, the IEP Team shall review the plan and modify it, as necessary, to address the behavior.

(2) *Authority of Hearing Officer.* A hearing officer under this section may order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer -

(A) determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of such child is substantially likely to result in injury to the child or to others;

(B) considers the appropriateness of the child's current placement;

(C) considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and

(D) determines that the interim alternative educational setting meets the requirements of paragraph (3)(B).

(3) *Determination of Setting.*

(A) In General. The alternative educational setting described in paragraph (1)(A)(ii) shall be determined by the IEP Team.

(B) Additional Requirements. Any interim alternative educational setting in which a child is placed under paragraph (1) or (2) shall -

(i) be selected so as to enable the child to continue to participate in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP; and

(ii) include services and modifications designed to address the behavior described in paragraph (1) or paragraph (2) so that it does not recur.

(4) *Manifestation Determination Review.*

(A) In General. If a disciplinary action is contemplated as described in paragraph (1) or paragraph (2) for a behavior of a child with a disability described in either of those paragraphs, or if a disciplinary action involving a change of placement for more than 10 days is contemplated for a child with a disability who has engaged in other behavior that violated any rule or code of conduct of the local educational agency that applies to all children -

(i) not later than the date on which the decision to take that action is made, the parents shall be notified of that decision and of all other procedural safeguards accorded under this section; and

(ii) immediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action is made, a review shall be conducted of the relationship between the child's disability and the behavior subject to the disciplinary action.

(B) Individuals to Carry Out Review. A review described in subparagraph (A) shall be conducted by the IEP Team and other qualified personnel.

(C) Conduct of Review. In carrying out a review described in subparagraph (A), the IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team -

(i) first considers, in terms of the behavior subject to disciplinary action, all relevant information, including -

(I) evaluation and diagnostic results, including such results or other relevant information supplied by the parents of the child;

(II) observation of the child;

(III) the child's IEP and placement; and

(ii) then determines that -

(I) in relationship to the behavior subject to the disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

(II) the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

(III) the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

(5) *Determination That Behavior Was Not Manifestation of Disability.*

(A) In General. If the result of the review described in paragraph (4) is a determination, consistent with paragraph (4)(C), that the behavior of the child with a disability was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except as provided in Section 1412(a)(1). [state ages limits; incarcerated non-special education 18 to 21 year olds]

(B) Additional Requirement. If the public agency initiates disciplinary procedures applicable to all children, the agency shall ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action.

(6) *Parent Appeal.*

(A) In General.

(i) If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement, the parent may request a hearing.

(ii) The State or local education agency shall arrange for an expedited hearing in any case described in this subsection when requested by a parent.

(B) Review of Decision.

(i) In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency had demonstrated that the child's behavior was not a manifestation of such child's disability consistent with the requirements of paragraph (4)(C).

(ii) In reviewing a decision under paragraph (1)(A)(ii) to place the child in an interim alternative educational setting, the hearing officer shall apply the standards set out in paragraph (2).

(7) *Placement During Appeals.*

(A) In General. When a parent requests a hearing regarding a disciplinary action described in paragraph (1)(A)(ii) or paragraph (2) to challenge the interim alternative educational setting or the manifestation determination, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided in paragraph (1)(A)(ii) or paragraph (2), whichever occurs first, unless the parent and the State or local educational agency agree otherwise.

(B) Current Placement. If a child is placed in an interim alternative educational setting pursuant to paragraph (1)(A)(ii) or paragraph (2) and school personnel propose to change the child's placement after expiration of the interim alternative placement, during the pendency of any proceeding to challenge the proposed change in placement, the child shall remain in the current placement (the child's placement prior to the interim alternative educational setting), except as provided in subparagraph (C).

(C) Expedited Hearing.

(i) If school personnel maintain that it is dangerous for the child to be in the current placement (placement prior to removal to the interim alternative educational setting) during the pendency of the due process proceedings, the local educational agency may request an expedited hearing.

(ii) In determining whether the child may be placed in the alternative educational setting or an another appropriate placement ordered by the hearing officer, the hearing officer shall apply the standards set out in paragraph (2).

(8) *Protections for Children Not Yet Eligible for Special Education and Related Services.*

(A) In General. A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, including any behavior described in paragraph (1), may assert any of the protections provided for in this part if the local education agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of Knowledge. A local educational agency shall be deemed to have knowledge that a child is a child with a disability if -

- (i) the parent of the child has expressed concern in writing (unless the parent is illiterate or has a disability that prevents compliance with the requirements contained in this clause) to personnel of the appropriate educational agency that the child is in need of special education and related services;
- (ii) the behavior or performance of the child demonstrates the need for such services;
- (iii) the parent of the child has requested an evaluation of the child pursuant to Section 1414; or
- (iv) the teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior or performance of the child to the director of special education of such agency or to other personnel of the agency.

(C) Conditions That Apply if No Basis of Knowledge.

- (i) In General. If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B)) prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).
- (ii) Limitations. If a request is made for an evaluation of a child during the time period in which the child is subject to disciplinary measures under paragraph (1) or (2), the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with the provisions of this part, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

(9) *Referral to and Action by Law Enforcement and Judicial Authorities.*

(A) Nothing in this part shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and state law to crimes committed by a child with a disability.

(B) An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.

(10) *Definitions.* For purposes of this subsection, the following definitions apply:

(A) Controlled Substance. The term "controlled substance" means a drug or other substance identified under schedules I, II, III, IV or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(B) Illegal Drug. The term "illegal drug" -

- (i) means a controlled substance; but
- (ii) does not include such a substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

(C) Substantial Evidence. The term "substantial evidence" means beyond a preponderance of the evidence.

(D) Weapon. The term "weapon" has the meaning given the perm "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.

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44th ANNUAL EDUCATION LAW ASSOCIATION CONFERENCE

LEGAL RIGHTS IN EDUCATION: PENDULUM SWINGS

November 21, 1998
Charleston, South Carolina

RECENT DEVELOPMENTS IN THE LAW OF SEXUAL HARASSMENT: SAME SEX AND STUDENT-TO-STUDENT HARASSMENT

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RECENT DEVELOPMENTS IN THE LAW OF SEXUAL HARASSMENT: SAME SEX AND STUDENT-TO-STUDENT HARASSMENT

By: Margaret A. Chidester, J.D., Ed.D.

Recent decisions of the federal courts have provided additional guidance for educators dealing with unanswered questions concerning the extent of their responsibility and liability for allegations of unlawful sexual harassment, including employee-to-student harassment, student-to-student harassment, and same sex harassment.

The United States Supreme Court has recently granted certiorari in the case of Davis v. Monroe County Board of Education (11th Cir. 1997) 120 F.3d 1390, an indication that additional guidance will be provided during the 1998-99 term of the Court.

Same Sex Harassment

In March, 1998, the United States Supreme Court decided the case of Oncale v. Sundowner Offshore Services, Inc. ____ U.S. ____, 118 S.Ct. 998 (1998). Concerning the factual posture of the case, Justice Scalia wrote: "The precise details are irrelevant to the legal point we must decide, and in the interest of both brevity and dignity, we shall describe them only generally." What we do know from the Court's opinion is that Joseph Oncale, an employee of Sundowner Offshore Services, worked on a Chevron USA, Inc. oil platform in the Gulf of Mexico as a roustabout on a crew of eight men. The crane operator and driller on the crew had supervisory authority. The Court's opinion indicates that on several occasions, Oncale was forcibly subjected to sex-related humiliating actions against him by the two supervisors and another member of the crew in the presence of the remaining crew members. The two supervisors physically assaulted Oncale in a sexual manner, and one of them threatened him with rape.

When Oncale's complaints to supervisors merely elicited a statement from the company's Safety Compliance Clerk that the two supervisors picked on him all the time as well, Oncale gave his notice, requesting that his termination documents state that he "voluntary left due to sexual harassment and verbal abuse." He later testified that he feared that if he did not leave his job, he would be raped or forced to have sex.

The district court rejected Mr. Oncale's sex discrimination in employment claim stating, "Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers." (Id. at 1001.) The decision was affirmed on appeal by the Fifth Circuit.

Title VII of the Civil Rights Act of 1964 proscribes discrimination by any employer with respect to compensation, terms, conditions, or privileges of employment because of the race, color, religion, sex, or national origin of an employee. 78 Stat. 255 (amended), 42 U.S.C. § 2000e-2(a)(1). The Supreme Court held:

> "If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination 'because of ... sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are the same sex." (Id. at 1001-1002.)

The Court indicated that holdings of lower courts requiring proof of the homosexuality of the harasser were inapposite. Aside from its clear holding that same sex harassment is actionable, the Court gave employers guidance as to workplace conduct that does not constitute sex discrimination:

> "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at 'discriminat[ion] ... because of ... sex.' We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. 'The crucial issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" Harris, supra at

> 25, 114 S.Ct., at 372 (Ginsburg, J., concurring). (118 S.Ct. at 1002.)

The Court also provided instructive comments concerning the nature of the motivation for harassment:

> "But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimina[tion] ... because of ... sex.'" (118 S.Ct. at 1002.)

Finally, the Court confirmed that the objective severity of the harassment must be judged from the perspective of a reasonable person in the position of the plaintiff, considering all the circumstances. The Court concluded its explanation with an example of the football coach that smacks a player on the buttocks as he heads onto the field would not be thought to engage in sexual harassment for such contact, however, the same gesture to his secretary in an office setting might be perceived as severely or pervasively abusive.

Student-to-Student Harassment

By the end of the 1998-99 term of the United States Supreme Court, educators may anticipate further guidance in the area of student-to-student harassment. The Supreme Court last month granted certiorari in the case of Davis v. Monroe County Board of Education (11th Cir. 1997) 120 F.3d 1390. The Davis opinion contains the 11th Circuit's scholarly examination of guidance from the Supreme Court on alleged Title IX violations in teacher-to-student cases, as well as a survey of the law of the circuits on school district liability for student-to-student sexual harassment.

LaShonda Davis, a fifth grade student at Hubbard Elementary School alleged eight separate incidents of sex harassment by a fifth grade student referred to as "G.F." The incidents occurred between December 17, 1992 and May 19, 1993. LaShonda reported four of the incidents to one teacher, two to a second teacher, two to a third teacher, and the final incident to her mother and the principal. The harassment included alleged attempts to touch LaShonda's breasts and vaginal area, comments such as "I want to get in bed with you," and "I want to feel your boobs," G.F.'s placing of a doorstop in his pants in a sexually suggestive manner, and rubbing his body against LaShonda in a manner that she considered to be sexually suggestive while in the hallway en route to lunch. LaShonda and her mother claimed that LaShonda suffered mental anguish as a result of these incidents, and identified the incidents as the cause of both her grades dropping during the 1992-93 school year and the suicide note that she wrote in April, 1993.

The lawsuit by LaShonda and her mother alleged violation by the District and two school officials of Title IX for failure to prevent LaShonda from being sexually harassed at school. Additional allegations of race discrimination and violation of 42 U.S.C. § 1981 were dismissed by the trial court and were not appealed. Likewise, her 1983 claim was dismissed, then appealed in part, but there was no petition for rehearing on that claim. The opinion is thus confined to the Title IX claim against the governing board only, as there was no appeal from the dismissal of the claims against the individuals.

The Court commenced its examination of the Title IX claim in the context of student-to-student harassment decisions by other federal courts. Title IX provides that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in any educational program or activity receiving federal financial assistance. (20 U.S.C. § 1681 (1984).)

Several district courts have allowed a student to sue a school board for failure to prevent hostile environment sex harassment by a fellow student under a Title IX theory: Doe v. Londonderry School District, 970 F.Supp. 64 (D.N.H. 1997); Nicole M. v. Martinez Unified School District, 964 F.Supp. 1369, 1372-78 (N.D. Cal.); Collier v. William Penn School District, 956 F.Supp. 1209, 1213-14 (E.D. Pa. 1997); Bruneau By and Through Schofield v. South Kortright Central School District, 935 F.Supp. 162, 172 (N.D.N.Y. 1996); Doe

v. Petaluma City School District, 830 F.Supp. 1560, 1576 (N.D. Cal. 1993), rev'd on other grounds, 54 F.3d 1447 (9th Cir. 1995); Burrow v. Postville Community School District, 929 F. Supp. 1193, 1205 (N.D. Iowa 1996); Wright v. Mason City Community School District, 940 F.Supp. 1412, 1419-20 (N.D. Iowa 1996); Bosley v. Kearney R-1 School District, 904 F. Supp. 1006, 1023 (W.D. Mo. 1995); Oona R.-S. v. Santa Rosa City Schools, 890 F.Supp. 1452, 1469 (N.D. Cal 1995); Patricia H. v. Berkeley Unified School District, 830 F.Supp. 1288, 1293 (N.D. Cal. 1993).

The Eleventh Circuit Court of Appeals observed that appellate courts reviewing these decisions have been less supportive of school district liability for student-to-student harassment claims under Title IX, and noted the lack of a United States Supreme Court decision on the student-to-student harassment issue.

Based upon a lengthy examination of the legislative history of Title IX, the Court concluded that such history did not indicate that Congress had authorized a private cause of action for student-to-student sexual harassment. Rather, the enactment of Title IX under the Spending Clause of the United States Constitution (U.S. Constitution, Article I, § 8, Cl. 1) indicated that Title IX, like Title VI, was under the congressional power to spend for the general welfare of the United States. The Court reasoned that when the Congress enacts legislation under the spending clause, it is in effect an offer to form a contract with a potential recipient of federal funding, and such recipient remains free to decline or to terminate a grant of federal funding if the conditions of the grant do not meet the needs of a local constituency. The Davis Court reasoned that to ensure the voluntariness of participation in federal programs, the Supreme Court has required Congress to give potential recipients unambiguous notice of the conditions under which they accept federal funding. It therefore based its analysis on an examination of whether Congress gave the school board of Monroe County unambiguous notice that the school board could be liable for failing to stop G.F.'s harassment of LaShonda.

The Court held that the terms of Title IX give educational institutions notice that they must prevent their employees from themselves engaging in intentional gender discrimination, however, there was no such notice in Title IX of any potential liability for unabated student-to-student harassment. The Davis Court found that acceptance of LaShonda's theory would result in a form of "whipsaw liability" where public schools are faced with lawsuits from both the alleged harasser and the alleged victim of the harassment. It found that in practical terms, to accept such a theory of liability would result in a school being required to immediately suspend or expel a student accused of sexual harassment:

> "Appellant's standard of liability therefore creates for school boards and school officials a Hobson's choice: On the one hand, if a student complains to a school official about sexual harassment, the official must suspend or expel the alleged harasser or the board will face potential liability to the victim ...
>
> "On the other hand, if the public school official, presiding over a disciplinary hearing, suspends or expels the alleged harasser, the school board may face a lawsuit alleging that the official acted out of bias--out of fear of suit."

The Court observed that the right to a public education under state law is a property interest protected by the due process clause of the Fourteenth Amendment, thus, a pre-deprivation hearing must afford a student due process. Since a fair hearing in a fair tribunal is a basic element of due process, a decisionmaker presiding over the hearing must be impartial. Accepting appellant's theory of liability, which could impose personal liability on any public school official learning of alleged harassment who failed to exercise his authority to prevent a recurrence, public school officials would literally have a financial incentive to punish alleged student harassers and thus, could not be said to be fair and impartial decisionmakers.

The Court concluded:

> "An enactment under the Spending Clause must read like a prospectus. Just as a prospectus must unambiguously disclose all material facts to a would-be purchaser, an enactment under the Spending Clause must unambiguously disclose to would-be recipients all facts material to their decision to accept Title IX funding. The threat of whipsaw liability in a substantial number of cases would materially affect a Title IX recipient's decision to accept federal funding, yet Congress did not provide unambiguous notice of this type of liability in the language or

> history of that statute. We will not alter retrospectively the terms of the agreement between Congress and recipients of Title IX funding."

While there was no cause of action under Title IX, the Court observed that Georgia tort law could possibly provide an avenue of redress for LaShonda.

From the concurring and dissenting opinions of the Eleventh Circuit which run in excess of 13 pages, we may anticipate the basis for the eventual decision of the Supreme Court. In the meanwhile, we can only be guided by the law of the individual circuits, which, disconcertingly often find liability on the part of school districts and school officials for failure to prevent student-to-student harassment.

Recommendations to School Administrators to Limit Potential Liability for Student-to-Student Sexual Harassment Claims

1. With legal counsel, closely examine your current sex harassment and discrimination policies to assure that they are in compliance with the most recent case law.

2. Distribute the current policy to staff and students periodically, and provide age-appropriate training to students about what constitutes sexual harassment and how to make a report under the policy.

3. Inservice all administrative and teaching staff on what constitutes sexual harassment, what their individual reporting obligations are, and the requirements of the OCR guidelines in addressing sexual harassment.

4. Make it abundantly clear to staff that they may potentially incur personal liability with no indemnification by the district for willful or negligent failure to carry out their duties under the policy and federal law.

5. Identify staff responsible for investigation of sexual harassment at the site level and provide appropriate training in investigative techniques. Make clear which individuals are designated and authorized to conduct investigations versus simply reporting allegations for further investigation.

6. Never assume that because a complaint is not placed in writing, or because complainant has requested that you take no action, that either circumstance will excuse you from liability for failure to investigate and act on unlawful sexual harassment.

7. Prior to finalizing an investigative report or taking corrective action (but as promptly as possible), confirm with legal counsel the appropriateness of the remedy and the report. Realize that any factual report of the investigation may and likely will be used against the district in a lawsuit by the student. Be aware that the investigator, even if it is district's counsel, will likely be called as a witness in the event of a student lawsuit.

44th Annual Education Law
Association Conference

Legal Rights in Education:
Pendulum Swings

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Recent Developments in The Law of Sexual Harassment: Same Sex and Student-to-Student Harassment

Presented By:

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EXAMPLES OF TYPES OF SEXUAL CONDUCT THAT MAY CREATE A HOSTILE ENVIRONMENT

Non-Verbal/Visual	Verbal	Physical
Displaying sexually suggestive magazines/ cartoons/pin-ups/posters	Sexual innuendos/rumors/ Suggestive comments	Unwanted sexual touching
Obscene gestures	Comments on clothing or physical appearance	Pulling up/snapping/pulling down/grabbing clothing
Lip or tongue motions	Asking unwanted, personal, sexual, intimate questions	Massaging/grabbing/ pinching/fondling/brushing the body
Sexually explicit e-mail letters/writings on desks/books/lockers	Whistling, catcalls, patronizing names, offensive language	Physical interference with movements/cornering/ blocking or following/ leaning over/impeding movement
Sexual computer screen savers	Sucking, mooing, kissing, howling sounds	Blowing on someone's neck/hair/ear
Graffiti of a sexual nature	Rating appearance, body parts, sexuality	Fondling/stroking/licking someone's skin
Leering/staring in a sexual manner	Pestering or pressuring for dates/asking for sex or sexual contact	Coerced sexual intercourse/rape/sexual assault
Looking down someone's blouse or up someone's skirt	Telling sexual jokes, rape jokes or demeaning gender-based jokes	Assaultive and intimidating physical conduct directed at someone because of their gender
Exposing sexual or private body parts	Shouting sexual obscenities	Brushing up against/ leaning on someone
Manipulating objects or food to create a sexual innuendo	Teasing, taunting, insulting remarks about sexuality, body parts or attractiveness	Back or neck rubs
Unwanted notes or love letters with a sexual message	Commenting about sexual activities, fantasies, sexual preferences or interests of others or self	Kissing

SEXUAL HARASSMENT v. FLIRTING

Power	Fun
Hostile	Friendly
Feels "bad"	Feels "good"
One sided	Reciprocal
Feel unattractive	Feel attractive
Is degrading	Is a compliment
Feels powerless	Feels in control
Power based	Equality
Negative touching	Positive touching
Unwanted	Wanted
Illegal	Legal
Invading	Open
Demeaning	Flattering
Sad/angry	Happy
Negative self-esteem	Positive self-esteem
Aggression	Affection
Exploitation	Exciting
Dominating	Delightful

EXAMPLES OF CONDUCT WHICH REQUIRE INTERVENTION

- Students "hanging out" around the lockers commenting on the physical appearance of students passing to class
- Spreading of sexual rumors
- Pressures for sexual activity
- "Making out" in the hallway
- Blocking movements
- Explicit pictures, posters, calendars in class or on notebooks
- "Pantsing", pulling clothes
- Name calling, verbal or written, of a sexual nature
- Sexual threats, demands, teasing, taunting
- Sexual gesturing, grabbing, bumping, brushing
- Passing of sexual notes, cartoons, jokes, pictures or pornographic material
- Homophobic sexual harassment
- Bra snapping
- Dismembering by making references to body parts
- Harassment of pregnant students, or those who have a child
- Poking, pinching, patting
- Sexual/racial comments -- "Exotic Beauty" syndrome
- Retaliatory harassment of a student reporting harassment
- Sexual assault toward a student with a "reputation"
- "Slam books"
- Teasing about body development, either over/under or early/late
- Whistling, catcalls
- Making jokes about rape in hallways
- Males bragging about the size of their penis

IS YOUR BEHAVIOR UNWANTED?

ASK YOURSELF THE FOLLOWING TEST QUESTIONS:

1. Would I want this behavior to be the subject of a column in the school newspaper, or to appear on the evening news?
2. Would I behave this way if a member of my family were standing next to me?
3. Would I want someone to act this way toward someone I love?
4. Is this behavior initiated equally by me and the other person?
5. Is there equal power and authority between me and the other person?
6. Does this behavior further the goals of our school or district?

IF THE ANSWER IS "NO",

RECONSIDER THE BEHAVIOR BEFORE ACTING

C. Joseph Oncale v. Sundowner Offshore Services, Incorporated: Same Sex Sexual Harassment

On March 4, 1998, the United States Supreme Court decided the case of Joseph Oncale v. Sundowner Offshore Services, Incorporated, 523 U.S.___ 118 S.Ct. 998. The facts before the United States Supreme Court were as follows: Joseph Oncale worked for Sundowner Offshore Services on a Chevron USA Oil Platform in the Gulf of Mexico. He was employed as a roustabout on an eight-man crew. On several occasions, Oncale was forcibly subjected to sex-related humiliating actions against him in the presence of the rest of the crew, two employees physically assaulted Oncale in a sexual manner and one threatened him with rape. Joseph Oncale eventually quit, asking that his pink slip reflect he "voluntarily left due to sexual harassment and verbal abuse." Joseph Oncale filed a complaint against Sundowner in the United States District Court alleging that he was discriminated against in his employment because of his sex. The district court held that "Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers." The Circuit Court of Appeal affirmed the district court decision.

In a unanimous 9-0 decision; the United States Supreme Court held that the prohibition found in Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000(e) - 2(a)(1)) against discrimination "because of ... sex" protects men as well as women. The Court also held that nothing in Title VII necessarily bars a claim of discrimination "because of ... sex" merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex. The Court's rationale was that they saw no justification in the statutory language or previous court decisions for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.

The Court was careful to note that Title VII does not prohibit all verbal or physical harassment in the work place; it is directed only at "discrimination ... because of ... sex." The critical issue said the Court, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed, citing Harris v. Forklift Systems, 510 U.S. 17,26 (1993). In Oncale, the Court held that harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. According to the Court, a plaintiff alleging same-sex harassment must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted "discrimination ... because of ... sex."

In Oncale, the Court reiterated that Title VII does not "reach genuine but innocuous differences in the way men and women routinely interact with members of the same sex and of the opposite sex." The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the "conditions of the victim's employment." According to the Court, conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive -- is beyond Title VII's purview, citing, Harris v. Forklift Systems, 510 U.S. 17, 21 and Meritor Savings Bank v. Vincent, 477 U.S. 57, 67. According to the Court in Oncale, the requirement that the harassing conduct must be severe or pervasive is crucial and "sufficient to insure that courts and juries do not mistake ordinary socializing in the workplace. ... such as male-on-male horseplay or intersexual flirtation .. for discriminatory conditions of employment," Oncale at ______.

The severity of harassment in a same-sex case should be judged from the perspective of a reasonable person in the plaintiff's position considering all of the circumstances. In same-sex harassment cases, that inquiry will require careful consideration of the social context in which particular behavior occurs and is experienced by the target. According to the Court, a professional football player's working environment is not severely or pervasively abusive for example if the coach smacked him on the buttocks as he headed onto the field, even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The Court concluded its decision in the Oncale case by stating:

> "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context will enable courts and juries to distinguish between simple teasing or rough housing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."

The conclusion that same-sex harassment is actionable under Title VII is supported by the EEOC Compliance Manual. The manual states: "[t]he victim does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex." See, EEOC Compliance Manual (CCH) section 6715.2(b)(3).

In California, the issue of same-sex harassment under state law was addressed in Mogilefsky v. Superior Court, 20 Cal.App.4th 1409 (1993). In support of its conclusion that same-sex harassment is actionable, the court cited decisions by the Department of Fair Employment and Housing. The court held that California Government Code section 12940(h) expressly prohibits any "harassment based on sex." Id. at 1416. In Mogilefsky, the court concluded "that a cause of action for sexual harassment in violation of Government Code section 12940, subdivision (h), may be stated by a member of the same sex as the harasser, whether based on the *quid pro quo* theory or the hostile environment theory or a hybrid of both theories." Id. at 1418.

In Doe v. Capital Cities, 50 Cal.App.4th 1038 (1996), an aspiring actor alleged he was drugged and gang raped at a casting director's home when he was applying for a job. The actor also alleged he was essentially at the director's beck and call and that the director declared he was the actor's manager. The court held it was not far-fetched for the actor to believe his attendance at the director's home had something to do with advancing his career and it was not implausible to believe the director occupied a position which could predictably create the risk that he could commit an intentional tort of this type. The Court of Appeal held California's Fair Employment and Housing Act (Government Code Sections 12940 et. seq.,) which state it is an unlawful employment practice for an employer to sexually harass an employee or an applicant (Government Code Section 12940(h)) applies to same gender harassment. According to the Court, harassment is defined to include physical harassment such as an assault (California Code of Regulations Title 2, Section 7287.6(b)(1)(B). Id. at 1045.

OFFICE FOR CIVIL RIGHTS POLICY GUIDANCE ON SEXUAL HARASSMENT OF STUDENTS

March 13, 1997

On March 13, 1997, the United States Department of Education, Office for Civil Rights, published its Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties, Federal Register Volume 62, No. 49, March 13, 1997. In Gebser v. Lago Vista Independent School District, 118 S.Ct. 1989 (1998), the United States Supreme Court discussed the Petitioner's reliance on the 1997 "Policy Guidance" position that "a school district should be liable in damages under Title IX where a teacher is "aided in carrying out the sexual harassment of students by his or her position of authority with the institution," irrespective of whether school district officials had any knowledge of the harassment and irrespective of their response upon becoming aware; Brief for Petitioners, 36 (quoting Department of Education, Office of Civil Rights, Sexual Harassment Policy Guidance, 62 Fed.Reg. 12034, 12039 (1997) (1997 Policy Guidance); Brief for United States as amicus curiae 14. In the Gebser case, the Court did not follow the OCR guidance because the Court concluded that it would "frustrate the purposes" of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of respondent superior or constructive notice, i.e., without actual notice to a school district official.

On July 1, 1998, United States Secretary of Education, Richard Riley, issued a press release regarding the impact of Gebser on Title IX. Secretary Riley stated "school districts continue to have a responsibility under Title IX to provide students with a non-discriminatory educational environment and the U.S. Department of Education continues to have a critical role in enforcing that obligation." Secretary Riley's July 1, 1998 press release, makes it clear that the United States Department of Education reads the Gebser case as recognizing the Department's authority to administratively enforce Title IX's regulation(s) which require schools to have well-publicized policies against discrimination based on sex, including sexual harassment, to have effective and well-publicized procedures for students and their families to raise and resolve these issues and to take prompt and effective action to equitably resolve sexual harassment complaints.

In Gebser, the Court neither followed nor disavowed the OCR's guidelines. Until the United States Supreme Court agrees to hear a case on the issue of peer-to-peer sexual harassment, the law is still unclear on school district liability in this area. The following is a summary of the major provisions of OCR's 1997 Policy Guidance. As of August, 1998, OCR had not decided how, if at all, the Gebser case affects their administrative authority to enforce Title IX and which portions of their guidance will be revised.

PERTINENT PROVISIONS OF OCR'S POLICY GUIDANCE

1. Definition

Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when it is sufficiently severe, persistent or pervasive to limit a student's ability to participate in or benefit from the education program or to create a hostile or abusive educational environment.

2. School District Liability

OCR will hold a school liable for student conduct where:

- A hostile environment exists.
- The school knows or should have known of the conduct.
- The school fails to take immediate, appropriate steps to remedy it.
- A school may also be held for sexual harassment by third parties.

3. Unwelcomeness

Conduct is unwelcome when the student being harassed did not "solicit or incite it" and "regarded the conduct as undesirable or offensive." A student's mere acquiesce or failure to complain does not mean the conduct is welcome, because students sometimes fear that complaining would worsen the situation. If there is a dispute over whether the conduct actually occurred, or whether it was welcomed, schools should consider the following factors:

- Statements by witnesses.
- Credibility evidence including corroborative evidence, detail and consistency.
- Evidence that the harasser had harassed others in the past, or that the accuser made false claims in the past.
- The reaction or behavior of the accused immediately after the alleged incident.
- Did the alleged victim report the harassment soon after it occurred?

4. Severe, persistent or pervasive

Factors to be considered when determining if student harassment was severe, persistent or pervasive include the following:

- The degree to which the conduct affected one or more student's education, for example, did the student's grades suffer following the harassment? Did the student persevere while feeling humiliated or angered by the harasser? Either would point to a hostile environment.

- The type, frequency and duration of the conduct. Look for a pattern or practice of harassment that is sustained and nontrivial. The more severe the conduct, the less the need to show a repetitive series of incidents.
- The number of individuals involved. In some cases, verbal comments or conduct from one person might not be sufficient to create a hostile environment, but might be if generated by a group.
- The age and sex of the alleged harasser and the subject(s) of the harassment.
- The size of the school, location of the incidents and context in which they occurred.
- Other incidents at the school.
- Incidents of gender-based, non-sexual harassment.

5. Notice

According to OCR, schools have notice of peer-to-peer sexual harassment if:

- A student filed a grievance.
- A student complained to a teacher about other students.
- A student/parent contacted the principal, campus security, bus driver, teacher, affirmative action officer or Title IX officer.
- An agent/responsible employee may have witnessed the harassment.
- Flyers about the incident were posted at the school.
- Members of the media/school staff/the educational community provided indirect notice.

According to OCR, schools will have constructive notice of peer-to-peer sexual harassment if:

- They should have known through a "reasonably diligent inquiry".
- The pervasiveness of the harassment, for example, the conduct was observed in the hallways, graffiti in public places, or conduct observed at recess/P.E. classes under a teacher's supervision.
- Harassment is pervasive when it is widespread, openly practiced or well-known to students and staff.

6. Grievance Procedures

At a minimum, schools are required to adopt Title IX Sex Discrimination Grievance Procedures which must also provide an effective avenue for responding to sexual harassment. These procedures should provide for:

- Notice of the procedure to parents, students and employees.
- Application of the procedure to complaints alleging peer-to-peer harassment.
- Adequate and reliable investigation by an impartial investigator.
- Designated timeframes for the major stages of the complaint process.
- Notice to the parties of the disposition of the complaint.
- Steps to prevent reoccurrence and correct its effects.
- A designated staff member who handles compliance with Title IX.

7. Reasonable Response

When a school learns of an incident of alleged sexual harassment, according to OCR they should do the following:

- Investigate and determine appropriate steps which will resolve the situation.
- Take reasonable, timely and effective corrective action.
- Focus the corrective action on the victim.
- Take appropriate steps including interim measures to end the harassment.
- Take steps to prevent future harassment.
- Insure that victims and their families know how to report further problems; make follow-up inquiries to see if there has been any retaliation.
- If a student requests confidentiality, take all possible steps to investigate and respond consistent with this request.

8. Prevention

Adopting a policy specifically prohibiting sexual harassment and having separate grievance procedures available for violations of that policy will help insure that all students and employees understand that the school will not tolerate sexual harassment. Other options include providing training for administrators, teachers and students to insure they understand what sexual harassment is and how to respond.

9. Prompt and Equitable Grievance Procedures

Schools should make sure students are well aware of the procedures by publishing them in all major school publications, including the student handbook, posting them at a prominent location at the school, publishing the procedures as a separate document and making individuals available to explain how to utilize the grievance procedures. In the context of peer sexual harassment, schools must adopt and publish grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex which provide for the following:

- Notice of the procedure to students, parents and employees.
- Application of the procedure to complaints alleging harassment by students.
- Adequate and reliable investigation of complaints by an impartial investigator, including the opportunity to present witnesses and other evidence.
- Designated timeframes for the major stages of the complaint process.
- Steps to prevent reoccurrence of any harassment and to correct its effects on the Complainant and others.

10. Notice of the outcome of a complaint and FERPA

A District's Title IX grievance procedures should provide for notice of the disposition of the complaint in a manner that is consistent with the Family Educational Rights and Privacy Act (FERPA). For instance, FERPA generally prohibits a school from releasing personally identifiable information from a student's education record without parental consent. This constraint may prevent a school from informing a complainant of any sanction or any discipline imposed where that information is contained in the student's discipline record.

11. First Amendment Issues

The protections of the First Amendment have to be considered where issues of free expression of speech are involved along with allegations of alleged harassment. Title IX is intended to protect students from sex discrimination and not to regulate the content of speech. For example, although a school could not issue an outright ban on student's expressing opinions about one sex that might be viewed as derogatory, it can take steps to denounce such opinions and state that the school does not condone such statements.

EMERGING CASE LAW ON SEXUAL HARASSMENT OF STUDENTS

A. INTRODUCTION

The emerging case law on sexual harassment of students can be divided into two types of cases: 1) sexual harassment of a student by a school district employee and 2) peer-to-peer student sexual harassment. The United States Supreme Court has decided two cases on the issue of sexual harassment of students by a teacher, Franklin v. Gwinnett County Schools, 503 U.S. 60 (1992) and Gebser v. Lago Vista Independent School District, 118 S.Ct. 1989 (1998).

Peer-to-peer student sexual harassment is a high risk, volatile, complex, cutting edge legal issue. The law on peer-to-peer harassment changes as society's values evolve and therefore is a very sensitive area which in certain circumstances the law has recognized as actionable. To date, the Supreme Court has declined to hear a case on peer-to-peer harassment.

B. TITLE IX LIABILITY FOR TEACHER-STUDENT SEXUAL HARASSMENT

1. Gebser v. Lago Vista Independent School District

On June 22, 1998, the United States Supreme Court decided the case of Alida Star Gebser v. Lago Vista Independent School District, 118 S.Ct. 1989 (1998). The facts before the United States Supreme Court were as follows: While Ms. Gebser was a high school student in the Lago Vista Independent School District, she had a sexual relationship with one of her teachers, Frank Waldrop. Mr. Waldrop conducted book discussion sessions and often made sexually suggestive comments to the students. He began to direct more of his suggestive comments toward Ms. Gebser when they were alone in his classroom. In the spring of Ms. Gebser's ninth grade year, when Mr. Waldrop visited her at home to give her a book, he kissed and fondled her. The two had sexual intercourse on a number of occasions during the remainder of the school year, the relationship continued through the summer and into the following school year where they often had intercourse during class time, although never on school property.

Ms. Gebser never reported the relationship to school officials and testified that while she realized Mr. Waldrop's conduct was improper, she was uncertain how to react and she wanted to continue having him as a teacher. In October, 1992, parents of two other students complained to the high school principal about the teacher's comments in class. The principal advised Mr. Waldrop to be careful about his classroom comments and told the school guidance counselor about the meeting but did not report the parent's complaint to the Lago Vista Superintendent, who was the District's Title IX coordinator. In January, 1993, a police officer discovered Mr. Waldrop and Ms. Gebser engaged in sexual intercourse and arrested Mr. Waldrop. The Lago Vista School District terminated his employment and his teaching credential was subsequently revoked. During this time period the District had not promulgated or distributed an official grievance procedure for lodging sexual harassment complaints; nor had it issued a formal anti-harassment policy.

The Court held in Gebser that under Title IX, a damages remedy will not lie against a school district, unless a school district official, who at a minimum had authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf, had actual knowledge of discrimination in the recipient's programs and failed to respond adequately. The Court stated that individual school employees could still be sued under 42 U.S.C. Section 1983 for Title IX violations and that their decision did not affect any right of recovery under state law against school districts and employees. In Gebser, the Court held that it would frustrate the purposes of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of respondeat superior or constructive notice, i.e., without actual notice to a school district official. The Court stated, "as a general matter, it does not appear that Congress contemplated unlimited recovery and damages against a funding recipient where the recipient is unaware of discrimination in its programs." Gebser. Id. at ____. The linchpin for the Court's holding was that Title IX conditions an offer of federal funding on a promise by the recipient of the funds not to discriminate, which essentially amounts to a contract between the government and the recipient of the funds.

The Court's rationale was that Title IX's contractual nature had implications for the Court's construction of the scope of available remedies because when Congress attaches conditions to the award of federal funds under its spending power, U.S. Const. Art. I, Section 8, cl. 1, the Court will closely examine the proprietary of private actions seeking to hold a recipient liable in monetary damages for non-compliance with the conditions attached to the receipt of federal funds. The Court held that the express remedial scheme set forth in Title IX is predicated upon notice to "an appropriate person" and an opportunity to rectify any violation, 20 U.S.C. § 1682, and held that "an appropriate person under Section 1682 is at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination." In Gebser, the Court added in a new standard that the appropriate person's response must amount to "deliberate indifference to discrimination." The basis for this standard was that Title IX's administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance.

The petitioners in the Lago Vista case argued that the district's asserted failure to promulgate and publicize an effective policy and grievance procedure for sexual harassment claims violated the U.S. Department of Education regulations requiring each funding recipient to "adopt and publish grievance procedures providing for prompt and equitable resolution of discrimination complaints" (34 C.F.R. § 106.8(b)(1997)), and to notify students and others that it does not discriminate on the basis of sex in the educational programs or activities which it operates" (34 C.F.R. § 106.9(a)). The Court rejected this argument by petitioners and held that the Lago Vista School District's alleged failure to comply with the regulations did not establish the requisite actual notice and deliberate indifference. The Court further said that the failure to promulgate a grievance procedure does not itself constitute "discrimination" under Title IX noting, however, that the U.S. Department of Education could enforce the requirement administratively.

2. Franklin v. Gwinnett County Schools

On February 26, 1992, the United States Supreme Court held in a unanimous 9-0 decision in Franklin v. Gwinnett County Schools, 503 U.S. 60 (1992), that monetary damages are available as a remedy for an action brought to enforce Title IX of the Education Amendments of 1972. Title IX provides in pertinent part:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." (20 U.S.C. § 1681(a) (1988))

Christine Franklin was a student at North Gwinnett High School in Gwinnett County, Georgia, from September 1985 through August 1989. Ms. Franklin alleged she was subjected to continual sexual harassment beginning in the fall of her tenth grade year by Andrew Hill, a teacher and sports coach employed by the district. She alleged that Mr. Hill engaged in sexually oriented conversations, asking her about her sexual experiences with her boyfriend, and whether she would consider having sexual intercourse with an older man. She also alleged that Mr. Hill forcibly kissed her on the mouth in the school parking lot, asked her if she would meet him socially, and on three occasions subjected her to coerced sexual intercourse in a private office on the school campus.

In the Franklin case, the Supreme Court held that Title IX's prohibition against sex discrimination includes discrimination that takes the form of a sexually hostile educational environment, i.e., a teacher sexually abusing and assaulting a student. The Court stated its rationale as follows:

> "Unquestionably, Title IX placed on the Gwinnett County Schools the duty not to discriminate on the basis of sex, and when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex. (Quoting Meritor, 477 U.S. at 64) We believe that the same rule should apply when a teacher sexually

> harasses and abuses a student. Congress surely did not intend for federal monies to be expended to support the intentional actions it sought by statute to prescribe." Id. at 75.

When a student is sexually harassed by a teacher or another school district employee, courts almost always uphold the disciplinary action and/or dismissal of the employee. In Governing Board of ABC Unified School District v. Harr, 28 Cal.App.4th 369 (1994), the Second District Court of Appeal applied the criteria for the termination of teachers for immoral conduct set forth in Morrison v. State Board of Education, 1 Cal.3d 214, 229 (1969) and held that a teacher's sexual harassment of female students constituted immoral conduct supporting the school district's termination of his employment. Harr was a tenured middle school music teacher charged by the school district with engaging in immoral conduct by sexually harassing female students. The Court of Appeal evaluated the trial courts finding for each charge and determined that the pervasive nature of Harr's conduct taken as a whole was enough to warrant dismissal.

C. TITLE IX LIABILITY FOR STUDENT TO STUDENT SEXUAL HARASSMENT

Although the decision in Franklin allowed the plaintiff to recover monetary damages under Title IX for sexual harassment by a teacher, the Supreme Court did not set forth a definitive legal standard for holding educational institutions liable under Title IX until it decided the Gebser case. After Franklin was decided in 1992, the ensuing years yielded a number of lower court opinions from across the country which struggled with the proper standard for imposing liability against school districts for student-to-student sexual harassment. At least two standards have emerged regarding liability of school districts under Title IX. The first standard is intentional conduct (i.e., discrimination on the basis of sex) See e.g., Smith v. Metropolitan School District, 128 F.3d 1014 (7th Cir. 1997); Rosa H. v. San Elizario Indep. School District, 106 F.3rd 648 (5th Cir. 1997); Davis v. Monroe County Board of Education, 120 F.3d 1390 (11th Cir. 1997); Rowinsky v. Bryan Independent School District, 80 F.3d 1006 (5th Cir. 1996); Bosley v. Kearney R-1 School District, 904 F.Supp. 1006 (E.D. Mo. 1995); Wright v. Mason City Community School District, 940 F.Supp. 1412 (N.D. Iowa 1996).

The second standard regarding liability of school districts under Title IX is negligent conduct (i.e., "knew or should have known"). See, e.g., Oona RS v. McCaffrey, 122 F.3d 1207 (9th Cir. 1997); Doe v. Petaluma City School District, 949 F.Supp. 1415 (N.D. Cal. 1996); Aurelia D. v. Monroe County Board of Education, 74 F.3d 1186 (11th Cir. 1996); Burrow v. Postville Community School District, 929 F.Supp. 1193 (N.D. Iowa 1996); Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996); Nicole M. v. Martinez Unified School District, 964 F.Supp.1369 (1997).

When the first cases of student-to-student sexual harassment were filed, there was discussion about the lack of any guidelines for school districts to follow because the regulations which implement Title IX did not include a definition of sexual harassment. In the early 1990's, the United States Department of Education's Office for Civil Rights issued informal letters of findings, stating school districts had violated Title IX for failing to "appropriately" respond to student-to-student sexual harassment. OCR's early letters of findings seemed to be applying legal principles developed under Title VII of the Civil Rights Act of 1964 to student-to-student "sexual harassment".

As new cases were decided at the district court and circuit court levels, one of the main issues was whether federal courts would adopt the legal standards developed under Title VII regarding sexual harassment in the employment context to sexual harassment between students. It was not until 1998 when the Supreme Court decided the Gebser case, that school districts had clear guidance from the United States Supreme Court that Title VII principles of liability were not controlling for purposes of Title IX liability.

In the Gebser case, the United States Supreme Court took note of the fundamental differences between Title IX and Title VII, i.e., that Title VII expressly defines an "employee" to include the employer's "agents", therefore courts have consistently applied the common law rules of agency to Title VII claims; however, Title IX contains no "agency" provisions. Title VII requires an exhaustion of administrative remedies, has a short time period for filing claims and statutory limits on damages while Title IX contains no such provisions. The court stated Title VII's goal is to "compensate victims of discrimination" while Title IX's goal is to "protect individuals from discriminatory practices carried out by recipients of federal funds."

In Nicole M. v. Martinez Unified School District, 964 F.Supp. 1369 (N.D. Cal. 1997), a female junior high school student sued the school district, superintendent, and principal, alleging sex discrimination in violation of Title IX, 42 U.S.C. § 1983, California Civil Rights Laws, violation of the California Education Code sections prohibiting sexual harassment in educational institutions, negligence, and negligent infliction of emotional distress. Nicole alleged that beginning in 1991 and continuing through the beginning of 1993 when she transferred out of Martinez Junior High School, male students repeatedly sexually harassed her by making unwanted verbal comments regarding her breasts and figure in general and on one occasion a male student touched her breast during class. Nicole's mother alleged that she told the principal, Dariene Guzman, that her daughter was being sexually harassed and gave her the names of the boys as well as the names of other female students who witnessed the harassment. The principal moved Nicole into new classes so she could avoid the worst harassers but subsequently the worst harasser was placed into one of Nicole's new classes. The plaintiff's alleged the principals acts in response to the reported sexual harassment, such as suspending the boy who sexually assaulted Nicole for one day, and speaking with a group of girls about the harassment but subsequently breaking her promise to keep this meeting confidential, subjected Nicole to further harassment.

The district court in Nicole M. held that allegations the District knew or should have known that she was being sexually harassed by other students, and the District's intentional failure to take steps which were adequate to stop the harassment, were sufficient to state a claim pursuant to Title IX for damages against the District. Moreover, the court held that Nicole M.'s notification of individuals who stood in an agency position to the District (such as teachers) was sufficient to establish liability under a "knew or should have known" standard, that the principal in her individual capacity was not entitled to qualified immunity from Nicole M.'s Section 1983 action to enforce her rights under Title IX, and that for purposes of qualified immunity, a reasonable official in the principal's position would have known that intentional discrimination against a student based on sex violated the Equal Protection Clause.

In Oona RS v. McCaffrey, 122 F.3d 1207 (9th Cir. 1997), a sixth grade student brought a civil rights action against school officials for violations of the Equal Protection Clause, The Due Process Clause, and Title IX, alleging that school officials were responsible for permitting sexual harassment by a student teacher and by boys in Oona's class. Oona was an eleven year old, sixth grade student in the Santa Rosa School District in the fall of 1992. Her complaint alleged that a male student teacher, Drew Ibach, assigned to her classroom that fall, sexually assaulted and harassed her by, among other things, sitting behind her in the classroom and straddling her with his legs, even after she pulled away, inappropriately staring, winking, hugging and touching her and other female students and fondling her buttocks while whispering his nickname for Oona in her ear. The complaint alleged some of the student teacher's inappropriate conduct occurred in the presence of her sixth grade teacher and the principal. When Oona's parents brought these allegations to the teacher's attention, the teacher spoke to the principal who spoke to the student teacher. The principal refused to remove him from the classroom because the incidents could not be verified.

Continuing into the Spring of 1993, Oona complained to her parents that several of her male classmates who were watching MTV in the teacher's classroom without the teacher's supervision made "loud and vulgar" comments about women who were shown in the MTV videos. Additionally, according to Oona's complaint, male students within the teacher's ear shot allegedly made vulgar references to female body parts and called Oona a "ho" and "lesbian", and one male classmate struck her in the face.

Oona brought suit against the school district and six individual defendants, McCaffrey, the teacher; Hill, the principal; Lundy, the Director of Elementary Education; Solie and White, Deputy Superintendents, and Ashbrook, Superintendent. Oona alleged her rights were deprived under the Equal Protection Clause, the Due Process Clause, Title IX and 42 U.S.C. Section 1983. The school district did not dispute Oona's Title IX claim but moved to have the Section 1983 claims for the deprivation of a Title IX right dismissed under three theories: 1) Title IX does not give rise to a Section 1983 action, 2) even if such a claim could proceed, the District and the individual defendant's conduct were insufficient to state a claim under Section 1983; and 3) even if the defendant's conduct gave rise to a Section 1983 deprivation of rights , they were entitled to qualified immunity.

Essentially, the District court held that Title IX created a right to be free from intentional gender discrimination which was enforceable through Section 1983. The District court in Oona disagreed with other district courts which held that Title IX was not enforceable under Section 1983 on the rationale that Congress neither expressed nor implied an intent to foreclose such a right of action when it enacted Title IX. In order for Oona R. to bring a Title IX claim through Section 1983 against individual school officials, she must satisfy one of two standards: 1) demonstrate school officials either intentionally discriminated against her on the basis of sex or 2) school officials were liable under traditional section 1983 standards for a subordinate's intentional discrimination under Title IX. The district court in the Oona R. case held that school officials had a duty to curb student-to-student harassment because "the right created by Title IX may be violated when female students are subjected to harassment by their male peers at school and school officials discriminate against the female students on the basis of sex in encouraging or failing to appropriately respond to such harassment." Id. at 1469. The district court rejected the defendant's claim that they were shielded from liability under Section 1983 under the doctrine of qualified or good faith immunity holding that the law entitling Oona to be free from sex discrimination under Title IX was clearly established at the time (the fall of 1992 through the Spring of 1993).

The school district defendants appealed the District court's decision in Oona R.S. to the Ninth Circuit Court of Appeal 122 F.3d 1207 (9th Cir. 1996). The issue on appeal was whether the right to be free from gender discrimination under Title IX was clearly established in 1992/1993. The Ninth Circuit held the Equal Protection Clause created a right for individuals (including students) to be free from intentional gender discrimination by state actors, and that this right was clearly established in 1988. Id. at 1209. The court denied the three school officials qualified immunity claim under the Equal Protection Clause. The Ninth Circuit also held that Oona's right to be free from gender discrimination under Title IX in the form of either teacher-to-student or peer-to-peer sexual harassment was clearly established when the alleged deprivations occurred in the Fall of 1992. Therefore, the Ninth Circuit affirmed the district court's decision which denied qualified immunity to the three named school officials. The three remaining named defendants, Patricia McCaffrey, Gerald Hill and Ron Lundy, have filed a petition for a Writ of Certiorari before the United States Supreme Court asking the Court to decide the fundamental issue of whether employees of a public school which receives federal funding are immune from suit against them in their individual capacities for asserted violations of Title IX based upon the doctrine of qualified immunity.

In Davis v. Monroe County Board of Education, vacated, No. 94-9121, 91 F.3d 1418 (granting en banc review) 11th Cir., August 1, 1996, 120 F.3d 1390 (11th Cir. 1997) (en banc decision), a mother sued the school board on behalf of her fifth grade daughter for the school official's alleged failure to remedy her daughter's taunting and harassment by male classmates. The original panel decision of the Eleventh Circuit held that Title VII standards apply and that a public school district is accountable for misconduct by its students. The school district appealed that decision and the Eleventh Circuit granted the motion for rehearing en banc on August 1, 1996, which vacated the panel decision. The en banc decision provided a detailed analysis of the legislative history of Title IX and a review of all district court decisions to date. The Eleventh Circuit's en banc decision rejected a theory of liability based upon whether a school official knew or should have known about sexual harassment and failed to act to prevent it. The Eleventh Circuit held that Title IX does not allow a claim for student-to-student sexual harassment because Congress gave no notice of its intent to create such liability. Furthermore, the Eleventh Circuit stated in order to prevail on a claim of student to student sexual harassment, a plaintiff needs to prove intentional discrimination. The plaintiffs in the Davis case have also petitioned the United States Supreme Court for a Writ of Certiorari.

In Rowinsky v. Bryan Independent School District, 80 F.3d 1006 (5th Cir. 1996), cert. denied, 117 S.Ct. 165 (October 7, 1996), two female junior high school students alleged that male students on the school bus physically and verbally harassed them. The female students alleged they reported their complaints to school officials and that the officials took no action or ineffective action, however, the school district demonstrated the male students were punished. The district court rejected the students' claim and the Fifth Circuit affirmed the district court in a 2 to 1 decision.

In Rowinsky, the Fifth Circuit acknowledged that Title IX provides a monetary remedy to students who are subjected to intentional sexual discrimination, however, the court distinguished discrimination caused by school officials from discrimination caused by fellow students. According to the Fifth Circuit, the legislative history and wording of Title IX does not encompass discrimination by third parties. The court relied on the legislative history of Title IX, including debates on the senate floor, which according to the court, demonstrated that the sponsors of the legislation were concerned about institutional practices and policies such as discriminatory admissions stating "the drafters of Title IX recognized that it was not a panacea for all types of sex discrimination... ." Id. at 510. The Fifth Circuit held that a student could pursue a Title IX action only if he or she could establish that the school district responded to sexual harassment claims differently based on sex; "Thus, a school district might violate Title IX if it treated sexual harassment of boys more seriously than girls, or even if it turned a blind eye towards sexual harassment of girls while addressing assaults that harm boys." Id. at 512. The United States Supreme Court declined to review the Fifth Circuit's decision in Rowinsky.

In Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996), a male high school student named Brian was subjected to a sexually degrading hazing incident while he was naked in a locker room after a football game. The incident was videotaped and shown to his girlfriend. After he complained, Brian allegedly was told "boys will be boys." As a result of his complaint, football season was canceled for the remainder of the school year, which allegedly increased student hostility toward Brian. The football coach publicly showed hostility toward Brian. The student sued the school district under several theories including a Title IX claim alleging a "hostile" environment. The Tenth Circuit concluded that Brian failed to show that the school official's conduct was based on his sex noting that Brian did not allege that the school district would have acted differently if a similar event had occurred in the woman's athletic program.

In Seamons v. Snow, the Tenth Circuit Court of Appeals held that: 1) the student did not establish that the hostility was sexual in nature, and therefore did not establish a Title IX claim; 2) the District's alleged failure to adopt a Title IX grievance policy and procedures was not itself an act of discrimination based on sex; 3) a civil rights action under Section 1983 is not barred by the availability of remedies under Title IX; 4) the student's due process claims based on the school district's failure to protect him from taunting and hostility from his fellow students failed to satisfy the state action component; 5) the student properly stated a claim that his complaint was entitled to First Amendment protection; and 6) the complaint stated a claim that school officials violated clearly established First Amendment law, therefore the officials were not entitled to dismissal based on qualified immunity.

In Nebozny v. Podlensky, 92 F.3d 446 (7th Cir. 1996), Jamie Nebozny was a student in the Ashland Public School District throughout his middle and high school years. During that time he alleged he was continually harassed and physically abused by fellow students because he was homosexual. In his middle and high school years, Nebozny reported the harassment to school administrators asking them to protect him and to punish his assailants. School administrators had a policy of investigating and punishing student-on-student battery and sexual harassment, but the plaintiff alleged they turned a deaf ear to his requests and also alleged that some school administrators mocked his predicament. Nebozny eventually filed suit against several school officials in the district pursuant to 42 U.S.C. Section 1983 alleging that the defendants: 1) violated his 14th Amendment right to equal protection by discriminating against him based on his gender, 2) violated his 14th Amendment right to equal protection by discriminating against him based on sexual orientation and 3) violated his 14th Amendment right to due process by exacerbating the risk that he would be harmed by fellow students and 4) violating his 14th Amendment right to due process by encouraging an environment in which he would be harmed.

The Seventh Circuit Court of Appeals reversed a grant of summary judgment for the school district and found that the school officials were not immune because 1) Nebozny could demonstrate that he received differential treatment amounting to discrimination based on both his gender and his sexual orientation and 2) school officials were not entitled to qualified immunity because in 1988 reasonable persons in the defendant's positions would have concluded that discrimination based on sexual orientation was unconstitutional. The Nebozny case illustrates that while discrimination on the basis of sexual orientation may not violate Title IX (the OCR guidance states the guidance is not meant to cover such discrimination), a school district may still be liable under state law, the 14th Amendment to the United States Constitution which guarantees equal protection, and 42 U.S.C. Section 1983.

On July 21, 1993, in Patricia H. v. Berkeley Unified School District, 830 F.Supp. 1288 (N.D. Cal. 1993), a United States district court judge ruled that Title IX of the Education Amendments of 1972, 20 U.S.C. section 1681(a), prohibits the maintenance of a sexually hostile educational environment in any education program or activity receiving federal financial assistance. The Patricia H. case is of major importance in California, because it was the first case to hold that there is a cause of action under Title IX for sexual harassment which creates a hostile educational environment. In Patricia H., the court's rationale for its decision was that Title IX is a remedial statute designed to be given a sweep as broad as its language. The Patricia H. decision is noteworthy because the court cited Education Code section 212.6 as recognizing sexual harassment as a form of sexual discrimination. In 1994, the Berkeley Unified School District agreed to settle the Patricia H. case out of court for $800,000.00. The details of the settlement were sealed by court order.

On August 30, 1993, a district court in the central district of Northern California issued an order in Jane Doe v. Petaluma City School District, 830 F.Supp. 1560 (N.D. Cal. 1993). The court gave Jane Doe leave to amend her claim under Title IX; thereby signaling that if a new complaint was properly drafted, the court would allow it to go forward. Jane Doe's complaint alleged that she was repeatedly subjected to sexual harassment by other students throughout her seventh and eighth grade years, that she informed school officials of the harassment and that they did not respond adequately. The Jane Doe case is the first case of peer-to-peer sexual harassment of students. The district court found that Jane Doe could bring a hostile educational environment sexual harassment claim under Title IX, however, to obtain monetary damages, she must prove intentional discrimination on the basis of sex on the part of an employee of the educational institution, not just that an employee or employees of the institution knew or should have known of the hostile educational environment and failed to take appropriate action to end it.

On May 12, 1995, the Ninth Circuit Court of Appeals issued an opinion in Jane Doe v. Petaluma City School District, 54 F.3d 144 (9th Cir. 1995). The issue on appeal before the Ninth Circuit was whether a junior high school counselor could be liable for his alleged inaction after Jane Doe complained about sexually harassing comments from other male and female students. In a 2-1 decision, the Ninth Circuit ruled the counselor did not have a legal duty to prevent sexual harassment by other students under Title IX of the Education Amendments of 1972. The court majority reversed a decision by United States District Court Judge Claudia Wilken, who refused to grant qualified immunity to Richard Homrighouse, a counselor at Kenilworth Junior High School. Jane Doe's complaint alleged Homrighouse told her "boys will be boys" and never told her or her parents of the school's Title IX grievance procedure. The Ninth Circuit's rationale for deciding the counselor did not have a legal duty to prevent peer-to-peer student sexual harassment was that during the time the sexually explicit remarks were made (the fall of 1990 to February 1992), courts had not established a duty for school officials to intervene on behalf of a student. In his dissenting opinion, Judge Harry Pregerson, wrote that although in 1990 no court held a school official liable for failing to stop student-to-student harassment, such a duty "would have been apparent to a reasonable school official."

On July 22, 1996, the district court reversed its earlier decision in Jane Doe v. Petaluma City School District, 949 F.Supp. 1415 (N.D. Cal. 1996), and stated that Title VII principles should apply for purposes of determining school district liability for peer-to-peer harassment. The court reasoned that school districts were on notice that student-to-student harassment was very likely in their schools particularly in junior high school. According to the court, in light of this knowledge, if a school district failed to develop and implement policies reasonably designed to bring incidents of severe or pervasive harassment to the attention of the appropriate officials, it must be inferred that the District intended the inevitable result of that failure which is a hostile environment. Therefore, the Title VII standard for intentional discrimination which imposed liability when an entity knew or should have known of the hostile environment and failed to take remedial action was the appropriate standard. On the eve of trial, the Petaluma case settled for approximately $250,000.00

D. PRACTICAL IMPLICATIONS OF THESE CASES FOR SCHOOL DISTRICTS

- Until the United States Supreme Court agrees to hear a case on the issue of peer-to-peer sexual harassment, the law is still unclear on school district liability in this area.

- The United States Department of Education, Office for Civil Rights, is expected to send a letter to all school superintendents in early September, 1998, which will state that school districts obligation to respond to student's complaints of sexual harassment is not changed by the Gebser decision.

- On July 1, 1998, United States Secretary of Education, Richard Riley, issued a press release regarding the impact of the Gebser case on Title IX. Secretary Riley stated "school districts continue to have a responsibility under Title IX to provide students with a non-discriminatory educational environment and the U.S.

Department of Education continues to have a critical role in enforcing that obligation."

- Secretary Riley's July 1, 1998 press release, makes it clear that the United States Department of Education reads the Gebser case as recognizing the Department's authority to administratively enforce Title IX's regulation(s), which require schools to have well publicized policies against discrimination based on sex, including sexual harassment, to have effective and well-publicized procedures for students and their families to raise and resolve these issues, and to take prompt and effective action to equitably resolve sexual harassment complaints.

- On June 25, 1998, the National Women's Law Center along with 16 other signatories wrote President Clinton stating deep concern about the Supreme Court's decision in Gebser, contending the case effectively barred access to the legal system for students and their families seeking redress for a school's failure to remedy sexual harassment. The letter urged President Clinton to commit his administration's resources to enhanced enforcement of Title IX's prohibition against sexual harassment and to work with Congress to draft a legislative remedy to Gebser.

- After the decision in the Gebser case, schools should conduct training which emphasizes that Title IX prohibits discrimination on the basis of sex including sexual harassment of students. Until the Supreme Court decides a peer-to-peer harassment case, schools should continue to follow the March 13, 1997 Office for Civil Rights Policy Guidance on Sexual Harassment of Students.

- To date, the Office for Civil Rights had not decided how, if at all, the Gebser case affects their administrative authority to enforce Title IX and which, if any, portions of their guidance will be revised. The Office for Civil Rights has indicated it will issue an addendum clarifying OCR's position regarding the issues of notice and liability as set forth in the March 13, 1997 guidance. No date has been set and the addendum may not be issued until 1999.

- Under California law, sexual harassment is prohibited by Education Code sections 212.5 and 212.6 and school districts are permitted to expel students in grades 4 - 12 who commit sexual harassment. (Education Code section 48900.2)

- Schools should have all employees, current and new hires, sign that they received a copy of the District's policies prohibiting sexual harassment of employees and students. All training sessions should be mandatory and have a sign-in sheet.

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School District Liability for Same Gender Sexual Harassment Between Students After *Oncale v. Sundowner Offshore Services* and *Doe v. Lago Vista ISD*

1. Issues

A. Is there a private cause of action for sexual harassment perpetrated by a private party?

1. Under Title VI?
2. Under Title VII?
3. Under Title IX?

B. Is there a private cause of action for same gender sexual harassment in the workplace?

C. Is there a private cause of action for same gender sexual harassment in the K-12 setting between students?

D. What guidance does Oncale provide?

2. What standard of liability applies in Title IX cases?

A. Title VII cause of action
for private, same gender sexual harassment

requires proof that the discrimination occurred "because of sex." *Fredette v. BPV Management Associates*, 112 F. 3d 1503, 1505 ( ), quoting *Meritor*.

only actionable claim under Title VII for sexual harassment is one "that is in some way linked to the Plaintiff's sex." *Doe v. City of Belleville, Ill.*, 119 F.3d 563, *570, quoting *Carr v. Allison Gas Co.*, 101 F.3d 514. 517)7th Cir. 1996).

Prior to *Oncale* (1998), *Doe v. City of Belleville* was the leading case. The Seventh Circuit required Plaintiff to establish a nexus between gender and harassment to establish a cause of action under Title VII for same gender sexual harassment.

Two questions raised in *Doe v. City of Belleville* :

1. "Can a man ever show that he was harassed 'because of his sex' where the harasser is another man?"

2. If male to male sexual harassment is actionable under Title VII, must the Plaintiff prove the harasser is homosexual?
    a. that his (P) gender motivated the harasser; (Yes) and
    b. that a similarly situated female worker would not have been harassed. (No).

Seventh Circuit concluded:
    same gender sexual harassment is actionable under Title VII.
Fourth Circuit disagrees:
    only homosexual can sexually harass member of same gender

    because the harassment there is motivated because of the victim's sex (as required by Title VII).

In *Oncale* the Supreme Court held that same gender sexual harassment is actionable under Title VII.

Supreme Court appears to have adopted holding in *Doe v. City of Belleville* that:

1. Same gender sexual harassment is actionable under Title VII, and
2. Title VII protects both men and women against discrimination 'because of sex.'

B. . Title VI Cause of Action

a. Is intent required? *(Guardians Ass'n v. Civil Serv. Comm'n of NY).*
Is discriminatory intent an essential element of a Title VI violation?

Five Supreme Court justices said Court of Appeals erred when it held that a private cause of action plaintiff must prove discriminatory intent to qualify for relief under Title VI.

Guardians majority held that intent is not an essential element of Title VI.

Guardians majority held that the administrative regulations of Title VI provide relief for unintentional discrimination

Therefore, Title VI and the Title VI implementing regulations reach both intentional and unintentional discrimination.

b. Under *Guardians*, Title VI reaches both intentional and unintentional discrimination.

If Title VI standard is applied to Title IX cases, then intentional discrimination is not an essential element of a Title IX violation.

But current application of the Title VI standard to student sexual harassment cases requires proof of intentional discrimination thereby ignoring the *Guardians'* majority who concluded that Title VI also reaches unintentional discrimination through the implementing regulations.

c. In *Bakke*, disparate impact, alone, is not sufficient to establish a Title VII violation.

But disparate impact could provide a basis for relief under Title VII if the challenged practice was not based on business necessity

or "if it lacked a manifest relationship to the employment in question."
Bakke, 438 U. S. 265; 309 (1978).

d. *Meritor Savings Bank FSB v. Vinson*, 477 U. S. 57 (1986) is the leading case applying Title VII principles to workplace sexual harassment.

It was the first time the Court held that hostile environment sexual harassment is actionable under Title VII.

That conclusion is based on the EEOC guidelines that provide an "administrative interpretation of [Title VII] by the enforcing agency." *Meritor*, at *63, citing 100 Cong. Rec. 2577-2584 at 2577 (1964).

To establish a violation of Title VII, a Plaintiff must prove:
1. discrimination is based on sex; and
2. the discrimination created a hostile or abusive work environment.

Actionable sex harassment under Title VII is defined as:
"sufficiently severe of pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor*, at *67, quoting *Henson v. Dundee*, 682 F.2d 897, at 904 (1982).

Plaintiff also must prove that the sexual advances are "unwelcome." *Meritor*, at *68, quoting 29 C.F.R. @1604.11(1) (1985).

The *Meritor* Court did not provide a rule of employer liability for hostile environment sexual harassment, but it did accept the EEOC's conclusion that Congress intended courts to consider agency principles in determining employer liability.

And the *Meritor* Court did not decide what the standard for employer liability would be, but they did discuss the notion of employer notice, drawn from agency principles.

Traditionally, under Title VII
an employer is held liable for supervisor's conduct where the employer knew or should have known of the discriminatory conduct.

Alternative standard suggested by the EEOC for hostile environment sexual harassment cases:
1. Availability of complaint process;
2. Did victim utilize the complaint procedure?;
3. Was procedure responsive to victim's complaints?

Under the EEOC standard:
If there is a complaint procedure, and
the victim did not take advantage of the procedure,

Then, the employer should be shielded from liability if the employer did not have actual knowledge of the sexually hostile environment.

An employer would be liable only
if it had actual knowledge of the harassment, or
there was no reasonable avenue available for the victim to make a complaint known to appropriate management officials.

Meritor has provided the basis for many of the student to student hostile environment sexual harassment cases.

Peer Sexual Harassment

1. Is there a private cause of action for student to student sexual harassment under Title IX?

In *Franklin v. Gwinnett*, the Supreme Court held
A private cause of action exists for teacher to student sexual harassment under Title IX.

But there is no agreement that a private cause of action exists under Title IX for student to student sexual harassment.

A private cause of action exists under Title IX:

See: *Oona R.-S v. McCaffrey*, 143 F.3d 473 99TH CIR. 1998); *Doe v. University of Illinois*, 138 F.3d 653, 661 97TH CIR. 1998); *Brzonkala v. Virginia Polytechnic* Institute, 132 F.3d 949, 958 94TH CIR. 1997), reh'g en banc granted, opinion vacated; *Franks v. Kentucky School for the Deaf*, 956 F. Supp. 741, 746 (E.D. Ky. 1996), aff'd on other grounds, 142 F.3d 360 (6th Cir. 1998); Doe *v. Londonderry School District*, 1997 U. S. Dist. LEXIS 10306 (D. N. H. 1997); *Nicole M. v. Martinez Independent School District*, 964 F. Supp. 1369 (N. D. Cal. 1997); *Collier v. William Penn School Dist.*, 956 F. Supp. 1209 (E. D. Pa. 1997); *Bruneau v. South Kortright Central. School District*, 935 F. Supp. 162 (N. D. N. Y. 1996); *Burrow v. Postville Community School District*, 929 F. Supp. 1193 (N. D. Iowa 1996); *Wright v. Mason City Community School District*, 940 F. Supp. 1412 (N. D. Iowa 1996); *Bosley v. Kearney R-1 School District*, 904 F. Supp. 1006 (W. D. Mo. 1995); *Oona R.-S. v. Santa Rosa City Schools*, 890 F. Supp. 1452 (N. D. Cal. 1995).

A private cause of action does not exist under Title IX:

See: *Garza v. Galena Park Independent School District*, 914 F. Supp. 1437 (S. D. Tex. 1994), "a student cannot bring a hostile environment claim under Title IX;" *Rowinsky v. Bryan Indep. School Dist.*, 80 F.3d 1006 (5th Cir.) cert. denied 117 S. Ct. 165 (1996). No cause of action exists where a school board merely knew or should have known of peer sexual harassment and failed to act; *Davis v. Monroe Co. Board of Educ.*, 1997 U. S. App. LEXIS 22314 (11th Cir. 1997). *Franklin* created a cause of action only for teacher to student sexual harassment, not for student to student sexual harassment.

Some courts resolve student to student sexual harassment cases without deciding whether or not a cause of action exists.

See: *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996), holding that the plaintiff failed to state a claim for student to student sexual harassment; *Murray v. New York University College of Dentistry*, 57 F.3d 243, 250 (2d Cir. 1995), holding that even if Title IX created a private cause of action for sexual harassment by a non-employee of the school, Plaintiff failed to allege that school officials knew or should have known of the harassment; and *Doe v. Petaluma City School District*, 54 F.3d 1447, 1452 (9th Cir. 1994), holding that a school counselor is entitled to qualified immunity.

Most courts assume, however, that a private cause of action exists under Title IX for peer sexual harassment between students based on the existence of a private cause of action under Title VI or Title VII.

2. Is intentional discrimination required for compensatory relief under Title IX?

Courts agree that intentional discrimination is required for money damages, based on Title VI cases.

See: *Alexander v. Choate*, 469 U. S. 287, 105 S. Ct. 712 (1985); *Guardians Ass'n v. Civil Serv. Comm'n of City of New York*, 463 U. S. 582 (1983); *Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996).

Rule: Damages are awarded for intentional discriminatory conduct by the recipients of federal financial assistance.

The rule was extended to Title IX cases in *Cannon v. University of Chicago*, 441 U. S. 677, 99 S. Ct. 1946 (1979).

Title IX is modeled after Title VI

Title VI requires proof of intentional discrimination for money damages.

Without intentional discrimination, only declaratory or injunctive relief are available.

See *Pfeiffer v. Marion Center Area School District*, 917 F.2d 779 (3rd. Cir. 1990); *Franklin v. Gwinnett Public Schools*, 112 S. Ct. 1028 (1992); *Doe v. Petaluma*, 830 F. Supp. 1560 (N. D. Cal. 1993).

Notice

Money damages are available only for intentional discrimination based on the **presence or absence of notice**.

If the recipient of federal funds is not a participant in the discriminatory conduct, then, the recipient has no knowledge of wrongful conduct and thereby lacks notice of the violation.

Recipients should not be responsible for the behaviors of others.

Unintentional discrimination

There is no notice.

Therefore, an institution should not be liable for conduct they are not aware of.

Rationale for this rule comes from the Legislative history of Title VI, discussed in *Guardians*.

Proof of intentional discrimination by the recipient of federal funds reveals recipient's knowledge that discriminatory conduct actually occurred.

Knowledge

comes from the recipient's active participation in the discriminatory conduct and that is the conduct Congress intended to punish through compensatory damages for intentional discrimination.

Notice to recipient of federal funds

is explained in *Davis v. Monroe Co. Bd. of Educ.*, 1997 U. S. App LEXIS 22314 (11th Cir. 1997).

Davis appears to foreclose suits against school districts for student to student sexual harassment because the legislative history contains no notice to school districts that they are subject to liability for peer sexual harassment.

However, in recent cases, courts have expressed disagreement with the Davis Court's interpretation of the legislative history suggesting that liability may attach to school districts for their actions or inaction in response to complaints to school officials of sexual harassment. The language of Title IX is clear that recipients of federal funds are on notice to maintain an environment free from discrimination. Therefore, inaction after a student complains to a school official constitutes notice of discriminatory conduct. Failure to act to end the discrimination is equivalent to deliberate indifference and deliberate indifference constitutes discriminatory intent by school officials.

See: *Haines v. Metropolitan Government of Davidson County, Tenn.*, 1998 U. S. Dist. LEXIS 13125 (M. D. Tenn. 1998).

3. Standard of Liability for Peer to Peer Sexual Harassment

Application of Title VI standard to Title IX cases requires proof that school district:

a. had actual or constructive knowledge of harassing behavior, and

b. despite that knowledge, school officials took no action to remedy the sexual harassment.

Notice element

differs from the Title VII standard

Some courts require

actual notice of harassment; and

(See: *Bruneau v. South Kortright Central School district*, 935 f. Supp. 162, 169-174 (N. D. N. Y 1996), holding that constructive notice is insufficient to establish school district liability).

school district intentionally failed to act to stop the harassment.

(See: *Wright v. Mason City Community School District*, 1996 U. S. Dist. LEXIS 13637 (N. D. Iowa 1996).

Title VI standard

is meant to hold institutions liable only where it is clear that the institution

had direct knowledge of illegal conduct
and participated in the illegal conduct by purposely (intentionally) taking no action to stop the misconduct.

It has been hard to make the connection between a school district's knowledge and inaction where a student harasses another student because school officials do not have supervisory power over the student harasser.

But see for a recent shift: *Haines v. Metropolitan Government of Davidson County, Tenn.*, 1998 U. S. Dist. LEXIS 13125 (M. D. Tenn. 1998).

Application of Title VII principles to Title IX cases

The Title VII standard has been relied on in most student to student sexual harassment cases.

Courts believe they are following *Franklin* and *Meritor*, but *Franklin* and *Meritor* are employment cases where the perpetrator was an adult.

Reliance on *Franklin* and *Meritor*

recently has been criticized.

Title VII is aimed at discrimination in the workplace, not discrimination between students.

It is based on **agency principles**.

But there is no agency relationship between a student harasser and school officials.

Therefore, there is no link between student's behavior and school districts' responsibility to protect students from peer inflicted sexual harassment.

Despite this conclusion, Title VII principles have shaped the law in this area in recent years.

Meritor gave us
the "discrimination based on sex" language 477 U. S. 57, at 66 (1986)

See: *Nicole M. v. Martinez USD*, 964 F. Supp. 1369, at 1375 (N. D. Cal 1997) "...when one student sexually harasses another student because of the student's sex, that student discriminates on the basis of sex."

as well as the employer "fails to take steps reasonably calculated to end harassment" language.

See: *Nicole M.*, at 1376, citing *Ellison v. Brady*, 924 F.2d at 881-82; See also *Davis v. Monroe County Board of Education*, 74 F.3d 1186, 1193 (11th Cir. vacated, pending reh'g en banc, 91 F.3d 1418 (11th Cir. 1996).

Franklin extended *Meritor* (discrimination based on sex)
to sexual harassment of a student by a teacher.

See: *Franklin*, 503 U. S. 60, at 75 (1992).

Meritor has been applied to peer sexual harassment in the workplace.

Franklin has been extended to student to student sexual harassment.

Confusion Over Applicable Standard for Student to Student Sexual Harassment

In *Nicole M.*, 964 F. Supp. 1369 (N. D. Iowa 1996), the court held:
Title IX doesn't impose liability on school districts for peer hostile environment sexual harassment 'absent allegations that the school district itself directly discriminated on the basis of sex.'" *Nicole M.*, at 1376, quoting *Rowinsky*, 80 F.3d 1006, 1008 (5th Cir. 1996).

Nicole M. test:
Requires proof that an employee:

1. who has been vested by the school board with supervisory powers over the offending employee,

2. actually knew of the abuse,

3. had the power to end the abuse, and

4. failed to do so.

Nicole M., 964 F. Supp. 1369, 1377, quoting *Rosa H. v. San Elizario ISD*, 106 F.3d 648, 650 (5th Cir. 1997).

Nicole M. extended the application of *Franklin* to peer sexual harassment cases between students.

Nicole M's Application of Franklin to peer sexual harassment between students

Teachers have a relationship with students that creates the same agency status found between employer and teacher when a teacher sexually harasses a student (see *Franklin*).

Therefore, a teacher informed by a student that another student is sexually harassing her

a. has notice of harassment and
b. is obligated to act with reasonable care

A teacher's failure to act after such notice imputes liability to the employer via agency principles.

Title VII principles applied in sexual harassment cases under Title IX

Davis factors

represent a compilation of existing Title VII guidelines used to determine if hostile environment sexual harassment exists in the workplace.

apply Title VII principles to establish a Title IX violation and to prove intentional misconduct by school districts.

Factors:

1. she belongs to a protected group;
   This factor established that the victim falls within the protection of Title IX.

2. She was subject to unwelcome sexual harassment;
3. The harassment was based on sex.
   factors 2 and 3 originated in *Meritor.*

   #2 requires the victim to prove sexual conduct was not welcome.

   #3 Some courts have required proof that the school district treated boys differently than girls. This requirement has been criticized.

The least restrictive interpretation of intent
requires proof that the school district intended to create a hostile environment for the Plaintiff.

4. Sexual harassment must be "sufficiently severe or pervasive so as to alter conditions of her education."
   This factor incorporates the requirement set forth in *Harris v. Forklift.*

5. Victim must show "that some basis for institutional liability" exists.

The *Davis* court intended to adopted the Title VII agency standard of liability with the adoption of this factor.

The factor requires proof that the school district

a. knew or should have known of harassment, and

b. failed to take prompt remedial action.

See: *Burrow v. Postville Comm'n Sch. Dist.*, 1996 U. S. Dist. LEXIS 9147 (N. D. Iowa 1996); *Nicole v. Martinez USD*, 964 F. Supp. 1369, 1376 (N. D. Cal. 1997).

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INTERNET & E-MAIL POLICIES IN SCHOOLS
Section D.8

Jon E. Anderson, Esq.

I. Introduction.

The computer is a tremendous tool in our schools, increasing productivity and efficiency. Computers also provide a gateway to widespread communication through electronic mail ("e-mail") and the Internet. The resources of a computer, and the networks to which it provides access, also provide school districts with new challenges. This outline examines the legal principles underlying these issues and provides practical suggestions for addressing them through a computer use policy.

II. E-mail in the Schoolhouse.

An e-mail system allows people to communicate with each other through the use of written messages generated by and stored on the computer system. Generally, e-mail messages are stored in a database on a network file server. All unread message titles are indexed in the user's "in-box." The user has the option of leaving read messages indexed in their in-box or organizing them into "folders." A user also can archive a message to their hard disk or diskette, or delete the message from the system. Only deleted and archived messages are removed from the e-mail database.

The important point for school districts to keep in mind is that, once transmitted, e-mail messages do not "disappear." Rather, they remain stored in the database until specific steps are taken to remove them. Some of the issues raised by this technology are addressed below.

A Monitoring Of E-mail.

1. Reasons Why An Employer May Want To Monitor Employees' E-mail.

An employer may have many legitimate reasons for monitoring its employees' e-mail. For example, if an employee is absent for an extended period of time, the employer may need to monitor or access that employee's e-mail to ensure that no important messages remain unanswered. Because retaining a large number of e-mail messages can slow down the operation of the system, an employer may want to monitor messages to determine which can be deleted from the system. Of course, an employer also may want to monitor messages to ensure that the system is being used in an appropriate manner (*i.e.*, that no inappropriate or illegal conduct is occurring.)

2. Legal Issues Raised By An Employer's Monitoring Of Employees' E-mail.

   a) Invasion of Privacy.

      The courts have recognized the existence of a right to privacy that is broad enough to cover certain conduct occurring in the work place. This concept is not new to the employment context. For example, the issue of invasion of privacy has arisen regarding employer searches of employee desks, lockers, and personal belongings. The issue in all of these cases, invariability, boils down to whether the employee had a reasonable expectation of privacy.

      The trend has been to find that an employee does not have a reasonable expectation of privacy in his e-mail communications. For example, in a case arising in Pennsylvania, an employee of the Pillsbury Company was fired for transmitting what the company deemed to be inappropriate and unprofessional messages over the company's e-mail system. The employee filed a lawsuit against Pillsbury claiming that it violated his right to privacy when it monitored his e-mail messages. The court disagreed. The court found that the employee could not have had a reasonable expectation of privacy in the e-mail communications that he made to others. The court reasoned that, once an employee disseminates an e-mail communication to others, the employee cannot expect that the communication will remain private. *Smyth v. The Pillsbury Company*, 914 F.Supp. 97 (E.D. Penn. 1996).

      The most simple and most effective way in which to ensure that employees do not have an expectation of privacy in their e-mail is to, simply, tell them just that. Issuing a policy that informs employees that the company maintains the right to access and monitor stored e-mail messages should defeat any expectation of privacy that employees may have. The elements of such a policy will be discussed at the end of this outline.

      Caveat: it should be noted, however, that regardless of whether an employer has the right to monitor e-mail messages, the employer still may have an obligation not to disseminate the content of these messages to others. Such dissemination could give rise to a separate cause of action for invasion of privacy or defamation.

b) Issues Arising Out of the Electronic Communications Privacy Act (the Wiretapping Law).

The Act, generally, makes it a violation of the law to intercept electronic communications and to access certain stored electronic communications. Because e-mail generally is accessed while it resides in storage, and not during transmission, the Act's prohibition against accessing stored communications would be most applicable.

A violation of the Act occurs when one, "intentionally accesses without authorization a facility through which an electronic communication service is provided . . . and thereby obtains . . . access to . . . electronic communication while it is in electronic storage in such system. . ." 18 U.S.C. § 2701.

(1) Exceptions to the stored communications provision.

Employers who own the e-mail system used by its employees would appear to be exempt from liability for accessing their employees stored e-mail under what is commonly referred to as "the employer owned system exception." This exception states, generally, that the prohibition against accessing stored communications does not apply with respect to conduct authorized "by the person or entity providing a wire or electronic communications service." This defense recently was upheld by the United States District Court in Nevada. _Bohach v. City of Reno, et al_, 1996 U.S. Dis. LEXIS 10715 (1996).

(2) Consent as a defense to the Act.

The Act specifically makes it a violation to access electronic communication "without authorization." Thus, it would not be a violation of the Act to access e-mail with the employee's consent.

c) 4th Amendment Search and Seizure Issues.

Employees in the public sector could, arguably, assert that accessing their e-mail would constitute an impermissible search under the 4th Amendment of the United States Constitution. The underlying issue in a case involving an asserted violation of the 4th Amendment, however, is whether the person making the claim has a legitimate expectation of privacy in the invaded place. Thus, as set forth above in the section on privacy, one defense to a 4th Amendment claim may be that no such expectation of privacy exists in the e-mail context.

In addition, no 4th Amendment claim exists where the individual consents to the search. Thus, a written policy informing employees that their e-mail is not private and including a provision where the employees' consent to the access and monitoring of their e-mail would provide a defense to both elements of the 4th Amendment claim: it would eliminate any expectation of privacy and would constitute consent to the search.

d) The Importance of a Written Policy.

As the foregoing underscores, a written policy regarding the employer's access to e-mail is important. At a minimum, the policy should inform employees that their e-mail is subject to monitoring by the employer, thus eliminating any expectation of privacy. In addition, the policy should incorporate a form, to be signed and returned to by the employee, consenting to such monitoring by the employer. A policy containing these two elements should provide a defense to actions brought under the theories of invasion of privacy, the Wiretap Act and 4th Amendment searches and seizures.

B. E-mail As Evidence.

1. E-mail As Evidence In Discrimination And Harassment Cases.

E-mail communications, just like written interoffice memoranda, can be used as evidence in employment lawsuits. For example, in a case that arose in New York involving the Microsoft Corporation, a supervisor's inappropriate, off-color comments made through e-mail were found to be admissible in a sex discrimination case. _See, Strauss v. Microsoft Corp._, 1995 U.S. Dis. LEXIS 7433 (1995).

The supervisor had sent e-mail messages to various employees in the office which included referring to another woman in the office as the "spandex queen"; an offer of $500 to a temporary receptionist if she would permit him to call her "sweet Georgia Brown"; and a reference to himself as president of the "amateur gynecology club." In all likelihood, these are not the kind of comments that the supervisor would have made in a written interoffice memo. He, apparently, thought that e-mail was somehow different. It is not. Thus, the lesson to be learned from the *Microsoft* case is that: if it is not appropriate for a written memo, it is not appropriate for e-mail.

2. Public Records Requests.

In the public sector, e-mail messages would fall within the broad definition of "records" subject to inspection by the public. As a result, public sector employers should review state records laws and address the procedures to be followed should a public records request seek e-mail information.

C. E-mail As A Method of Harassment.

E-mail, of course, is nothing more than a high tech way in which to communicate in the work place. Like other forms of communication, written or oral, harassing comments made through the e-mail could expose an employer to liability as sexual harassment. Thus, it may be advisable for employers to review their sexual harassment policies to clarify that inappropriate "communication" includes e-mail.

D. E-mail and Students

1. E-mail will be a significant communication device in the future. Students need to be educated in the appropriate use of e-mail as a means of communication.

2. Students need to be aware of the non-private nature of e-mail and aware of the legal consequences which may attach to improper use.

3. Students need to be educated that e-mail does not ordinarily disappear simply based on the student pressing the "delete" key.

III. The Internet in the Schoolhouse.

Many school districts are providing their employees with access to the powerful research tools of the Internet. Through the use of the Internet, employees may be able to transmit information to others via "bulletin boards" or "chat rooms." In addition, employees and students are able to obtain and download information and images from the Internet. The following will address some of the legal issues this technology may raise.

A. Employer Liability For Impermissible Transmission Of Information.

Whether employers can be held liable for defamatory or other impermissible statements made by employees through the employer's access to the Internet will, of course, depend on the nature of the comments and the facts of each case. In theory, however, there may be no reason to analyze the situations any differently than if the employee's statements had been sent out on a postal letter bearing the company's letterhead.

Employees need to be forewarned that the same discretion that they are expected to use in any written communication also should apply to communication via the Internet.

B. Sexual Harassment.

Sexual images are widely available on the Internet. These images can be accessed by a user and displayed upon the user's monitor. Conceivably, the display of such images on a monitor could give rise to a hostile environment sexual harassment claim.

At least one federal court has found that the display of pinups and pinup-type calendars in the work place can give rise to a cause of action for sexual harassment. Similarly, it is likely that the display of such images on a computer monitor in the work place could give rise to a cause of action of this type.

Accordingly, this issue should be addressed in a sexual harassment policy and/or in a computer use policy.

C. Copyright Infringement Concerns.

School Districts need to be mindful that software and other information that is downloaded through the Internet may be subject to the copyright laws. Downloading and using such information via the Internet is, realistically, no different than using a photocopier to reproduce printed copyrighted material. This similarity, however, often is not apparent to users and, thus, should be addressed in the computer use policy.

IV. Students and the Internet.

A. Access.

There is no right of access to the internet. A school may, consistent with its education mission, prescribe rules concerning access and further employ means to control the flow of objectionable material. Clearly, use of software programs to block, screen or filter objectionable content is appropriate. Moreover, direct supervision and monitoring of student use is not only permissible, but is recommended.

B. Free Speech Issues

A school district may exercise considerable control over student speech on the internet. In Hazelwood v. Kuhlmeier, 484 US 260, 108 S. Ct. 562, 98 L.Ed. 2d 592, the United States Supreme Court upheld the right of school districts to censor the context of the school newspaper produced by students under school supervision and as part of the educational program

> . . .the First Amendment Right of students in the public schools are not automatically co-extensive with the rights of adults in other settings….A school need not tolerate student speech that is inconsistent with its basic educational mission even though the government could not censor similar speech outside of school. Hazelwood, supra at 266. 108 S.Ct. at 567.

Under Hazelwood, a school may impose reasonable restrictions upon student speech over the internet provided the restrictions are directed to a school resource which is part of the curriculum.

Practice pointer. Many schools now have web sites. It is strongly recommended that creation and maintenance of such sites be part of the school curriculum and subject to direct school supervision and control.

C. FERPA Implications.

Many school computers that monitor/manage student internet access automatically store information concerning students on-line activities. This type of information, to the extent it may be traced to a particular student, may constitute "personally identifiable information" about a student.

Schools must be aware of the electronic data that their computers capture about a student and his/her use of the internet. Under FERPA, parents of minor students would likely be entitled to access this information.

Schools need to be careful about the information they put on their websites. Placement of personally identifiable information on the website concerning a student raises significant FERPA issues. It may also raise student records issues under state law.

D. Policy Development.

Students, like staff, need to know what use is acceptable and what is not, including the types of sites which may be visited. Students need to be forewarned that internet access is a privilege that may be taken away. Students need to be told of the rules concerning usage and of the possible consequences for violation of those rules.

Students should be told that the school district may track and monitor sites visited. It is recommended that this be done in policy and further that an introduction screen be developed to inform students of this possibility each time they initiate access. Written consent forms and rule acknowledgment forms preferably with parental notice/involvement is preferred.

V. Computer Use Policies.

The key to protecting the school district's interest is to develop and enforce reasonable computer use policies. These policies can, and should, provide direction concerning acceptable use and should counter expectations of users that differ from the actual rules and guidelines under which the system is operated.

A. Checklist of Considerations - E-mail Policy.

1. Establish that e-mail is not private, and that the school district reserves the right to monitor and access e-mail.

2. E-mail should not be used to send jokes or other comments that may be discriminatory, harassing or offensive to others, or to send material that defames an individual, company or business, or discloses personal information without authorization.

3. Limits should be placed on the personal use of e-mail. In any event, users should be reminded that their personal messages will not remain private.

4. The policy should address the procedures for deletion of messages.

5. The policy should address the issue of encryption.

6. For public sector employees, the policy should address procedures to follow in complying with a public records request.

7. A consent form should accompany the policy, whereby the user is, again, notified that e-mail messages are not private. The form should state that the user is consenting to the monitoring and access of their e-mail. It should contain a line for the user's signature.

B. Checklist of Considerations - Internet Policy.

1. The policy should address the personal use of the Internet. Depending on the school district's culture, the policy may provide that excessive, personal use of the Internet may lead to disciplinary action.

2. Similar to the e-mail policy, the policy addressing the Internet should inform users that their use of the Internet may be monitored and, as such, is not private.

3. Users should be put on notice, just as with the e-mail policy, that the Internet is not to be used to harass, defame, etc.

4. Consistent with the school district's policy on sexual harassment, users should be notified that they are not to display images of a sexual nature on their monitors.

5. Downloaded software and materials must be used and, if necessary, purchased in accordance with United States copyright law.

C. Query: Is there a duty to bargain over the development, implementation and enforcement of e-mail/internet policies? Certainly if the policy could lead to discipline, the impact of policy enforcement is likely a mandatory subject of bargaining.

VI. Conclusion.

The expanded use of computers in our schools has presented school districts with additional legal concerns. These concerns, however, can be addressed effectively through reasonable computer use policies. Because each school's specific needs may differ, it is recommended that you consult with legal counsel in preparing and enforcing such policies.

STUDENT INTERNET POLICY
XYZ SCHOOL DISTRICT

General Information

Internet access will be provided to the students of the xyz school district at times and places determined by the school district in accordance with the terms of this policy. Internet access from school computers is reserved solely for educational purposes. Use by outside groups is prohibited. Use by student clubs and organizations is limited to those times when the Internet access points are not in use for instruction and shall be limited to educational purposes and governed by this policy. Access to the Internet will be under the direction and supervision of the staff assigned to the Internet access area.

The school district reserves the right to monitor and control all Internet activity including, but not limited to, the transmission, receipt and storage of e-mail and the websites visited.

A violation of this policy will be treated as a violation of the student discipline code and may result in loss of internet access privileges.

Before students may be permitted access to the Internet, they will complete required training and process the requisite permission for access form.

No public forum is created through the provision of this access or the use of the system.

Prohibited Conduct

Students shall not:

1. Access, transmit, and/or retransmit material which promotes violence or advocates destruction of property.

2. Access, transmit, and/or retransmit any information containing sexually oriented material.

3. Access, transmit, and/or retransmit material which advocates or promotes violence or hatred against particular individuals or groups of individuals.

4. Use, possess and/or load bootleg software (bootleg software means any software which has been downloaded or is otherwise in the user's possession without the appropriate registration of the software, including the payment of any fees owing to the owner of the software);

5. Use encryption software from any access point within the school district;

6. Commit or attempt to commit any willful act involving the use of the network which disrupts the operation of the network within the school district including the possession, use or attempted use of computer viruses;

Disclaimer

The Internet contains extensive information on a variety of subjects. Not all this information is accurate or reliable, particularly where the advice of medical, legal, accounting or other professionals would be appropriate. Caution is advised with information obtained on the Internet. Users should not rely on advice found therein. The school district expressly disclaims responsibility for such advice.

EDUCATION LAW ASSOCIATION
LEGAL RIGHTS IN EDUCATION: *PENDULUM SWINGS*

LEGAL PITFALLS OF I.E.P. MEETINGS
November 21, 1998

Susan Clark, University of Akron
Julie Martin, Scott, Scriven & Wahoff, LLP

Mock I.E.P. Meeting Background

Eddie is in third grade. He is the only child of Donna Hopkins, who is divorced and has sole custody of Eddie. Eddie began having severe emotional outbursts in first grade. He was referred for special education and was identified as seriously emotionally disturbed (SED) under the Individuals with Disabilities Education Act (IDEA) in the middle of his first grade year. Eddie was placed in an SED classroom for the remainder of first grade and for second grade.

The IEP team was pleased with Eddie's progress in second grade. At the IEP meeting held last May, the team decided to place Eddie back in a regular education classroom. The SED teacher would be available to work with Eddie as he needed. Eddie also would receive occupational therapy, as he had in first and second grade, both direct and consult services for assistance in his handwriting. Ms. Hopkins had always disliked the label of SED and was glad to see Eddie get out of the SED classroom. She enthusiastically signed his IEP for the 1998-99 school year.

Eddie's behavior was acceptable in September but started to deteriorate in October. For example, he identified the "easy targets" in his third grade class and picked on these children during recess. The regular education teacher attempted to redirect Eddie but had little success. The SED teacher worked with Eddie when his behavior was particularly out of control. By the end of October, the SED teacher became concerned that Eddie was taking too much time away from the students in the SED classroom.

The regular education teacher had a number of phone conversations with Ms. Hopkins about Eddie's behavior in late October and early November. Ms. Hopkins insisted that the school needed to give Eddie time to adjust to the new classroom. At one point, Ms. Hopkins told the regular education teacher that she had talked to a lawyer at Disability Legal Rights Service and was not going to be pushed around by the school again.

On November 16, 1998, the regular education class was making construction paper turkeys to put around the classroom. A child sitting at a table with Eddie took the last piece of orange paper, and Eddie became angry. The regular education teacher attempted to redirect Eddie without success. Eddie was asked to go out in the hallway for additional redirection. Eddie ran out of the classroom with a pair of scissors in his hand. He ran into a restroom. The regular education teacher asked for the assistance of the SED teacher. When they arrived in the restroom, Eddie was standing on top of a toilet pointing the scissors at them and growling. It took the teachers over a half an hour to get Eddie out of the restroom and calmed.

The regular education and SED teachers met with the Administrator and decided that Eddie should be back in the SED classroom. The regular education teacher called Ms. Hopkins to set up an IEP meeting for as soon as possible. Ms. Hopkins could only meet on the weekend because of a project she was completing at her office. When the regular education teacher told Ms. Hopkins that they would be discussing a placement change, Ms. Hopkins said that they would have to wait to see what her lawyer said about that.

Avoiding Legal Pitfalls

I. IEP Team:

A. Parents.

- Parents are equal members of the team. For example, 34 C.F.R. Pt. 300, App. C. Question 26 (1993) reads: "What is the role of the parents at an IEP meeting? The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing, and revising the child's IEP. This is an active role in which the parents (1) participate in the discussion about the child's need for special education and related services, and (2) join with the other participants in deciding what services the agency will provide to the child."
- Make sure you know the legal standing of parents and step-parents and respect the rights of both. Consider whether there are confidentiality concerns with non-custodial family members.

B. Administrator.

- The team must include someone who is:
  -qualified to provide or supervise instruction;
  -knowledgeable about the general curriculum; and
  -knowledgeable about the availability of resources. 20 U.S.C. 1414(d)(1)(B)(iv).
- One person may be able to fill all of the above roles (e.g., special education director, principal, curriculum director).

- The team must also include a representative who can interpret evaluation results (e.g., school psychologist, special education director). 20 U.S.C. 1414(d)(1)(B)(v).

C. Teachers.

- The team must include at least one regular education teacher (if the child is, or may be, participating in regular education programming). 20 U.S.C. 1414(d)(1)(B)(ii).
- The team must include at least one special education teacher, or where appropriate, at least one special education provider. 20 U.S.C. 1414(d)(1)(B)(iii).
- The IDEA does not require that the teachers who currently have the child in class come to the meeting. The team may decide to have teachers who will have the child the next school year attend meeting.
- The IDEA specifically requires the regular education teacher, to the extent appropriate, to participate in developing the IEP, including positive behavioral interventions and strategies and supplemental aids and services and to participate in the review and revision of the IEP. 20 U.S.C. 1414(d)(3)(C) and 1414(d)(4)(B)

D. Therapists.

- Under the law, a school district does not need to have therapists at IEP meetings, but consider whether the team can make a decision without the person there.
- Consider having the therapist there for only part of the meeting to cut down the costs.
- Consider having the therapist there so there is a persuasive, knowledgeable witness at a due process hearing later.

II. Group dynamics:

A. Adversarial roles among parents and school personnel.

- Build consensus among all members of the team. Remember, however, that parental consent does not mean that the IEP provides a free appropriate public education (FAPE) or that the parents will not bring a due process request. While consensus between school personnel and parents is ideal, if no consensus is reached, the school district is required to formulate the plan. Hawes v. Bates, 24 IDELR 1018 (N.D. Ind. 1996).

- Avoid use of educational jargon.

- Listen to parents' perspective.

- Consider parents' perspective.

B. Adversarial roles among school personnel (mutiny on the team).

- Consider the impact of a difference of opinion among team members.

- Watch out for school personnel who make unilateral promises/threats to parents.

- Watch out for school personnel who make unilateral changes in educational programming.

C. Chairperson of the team.

- Appoint person to be the scribe.

- Appoint person to do follow up for next meeting.

- Appoint person to make sure deadlines are being met.

D. Lawyers' roles at meetings.

- Under 34 C.F.R. §300.344, both the parents and the school district can invite "other individuals" to IEP meetings which can include lawyers. The Office of Special Education Programs discourages school district counsel from attending IEP meetings particularly when parents are not represented and there is no pending due process request. 22 IDELR 734 (OSEP 1993).

- Lawyers need to be cognizant that they could become witnesses as a result of their participation.

III. Scheduling meeting:

A. Notice of meeting.

- A notice of a meeting must include the purpose, time and location of the meeting and who will be in attendance. 34 C.F.R. §300.345. The school district can satisfy the requirement of who will be in attendance by indicating the positions, and not the names, of those individuals. 23 IDELR 564 (OSEP 1994).
- Parents are not under an obligation to notify the school district if they will be inviting guests.

B. Scheduling meeting.

- Parents should be notified of meetings early enough to ensure that they will have an opportunity to attend, and the meeting should be scheduled at a mutually agreed on time and place. 34 C.F.R. §300.345.
- The IEP team can hold a meeting without parents if able to document efforts to meet including: 1) records of telephone calls made and results of calls; 2) copies of correspondence to parents regarding the meeting and any responses; and 3) documentation of visits to parents' home or place of employment.
- Consider holding a series of meetings or meeting over parents' lunch hour.
- Consider telephone conference calls for team participants who are unable to attend.

IV. Development of IEP:

A. Parental involvement.

- Under the Reauthorization to the IDEA, the IEP team must consider, among other things, "the concerns of the parents for enhancing the education of their child." 20 U.S.C. 1414(d)(3)(A)(i).

B. Statement of present levels. 20 U.S.C. 1414(d)(1)(A)(i).

- The IEP must include a statement of how the child's disability affects involvement and progress in general curriculum.

- For preschooler, the IEP must include a statement of how the disability affects participation in appropriate activities.

- Do not simply report test scores.

- Avoid educational jargon.

C. Annual goals and short-term objectives. 20 U.S.C. 1414(d)(1)(A)(ii).

- The IEP must include a statement of measurable annual goals and short-term objectives that:
  -Meet the child's needs that result from a disability to enable the child to be involved in and progress in general curriculum.
  -Meet the child's other educational needs that result from disability.

D. Special education, related services, supplementary aids and program modifications. 20 U.S.C. 1414(D)(1)(A)(iii).

- The IEP must include a statement of special education and related services and supplementary aids and services to be provided to the child and a statement of the program modifications or supports for school personnel to allow the child to attain annual goals, be involved in and progress in the general curriculum and participate in extracurricular and other nonacademic activities and be educated with nondisabled children.

- Make sure that IEP documents all the "extras" that are in place for the child.

E. Least restrictive environment. 20 U.S.C. 1414(d)(1)(A)(iv).

- The IEP must include an explanation of the extent to which the child will not participate with nondisabled children in regular education classroom.

F. Assessment. 20 U.S.C. 1414(d)(1)(A)(v).

- The IEP must include any modifications to be made to the administration of statewide or districtwide assessments of student achievement.

- If the child will not participate in such assessment, a statement must be made about why not and how the child will be assessed.

G. Transition services. 20 U.S.C. 1414(d)(1)(A)(vii).

- The IEP must include at age 14, and updated annually, a statement of transition service needs of the child that focuses on the child's courses of study.
- The IEP must include, beginning at age 16, a statement of needed transition services for the child including a statement of interagency responsibilities or any needed linkages.
- The IEP must include at age of majority, a statement that the child has been informed of rights under IDEA.

H. Progress reports. 20 U.S.C. 1414(d)(1)(A)(viii).

- The IEP must include a statement of how the child's progress toward annual goals will be measured.
- The IEP must include a statement of how the child's parents will be regularly informed at least as often as parents are informed of their nondisabled children's progress of the child's progress toward annual goals and whether the child will achieve goals by the end of the year.

I. Special factors. 20 U.S.C. 1414(d)(3)(B).

- When behavior impedes the child's learning or that of others, consider strategies for positive behavioral interventions.
- When the child has limited English proficiency, consider the language needs of the child.
- When the child is blind or visually impaired, provide instruction in Braille unless found not appropriate.
- Consider communication needs of the child and when the child is deaf or hard of hearing, consider the child's language and communication needs including opportunities for direct instruction in the child's language and communication mode.

- Consider whether the child requires assistive technology devices and services.

V. Procedural requirements for meetings:

A. Audio/video recording.

- Pt. 300, App. C Question 12 indicates that use of a tape recorder is not addressed by either the Act or the regulations. It is permissible at the option of either the parents or the school district.

- Any audio/video recording would be considered an educational record and subject to confidentiality requirements under the Family Educational Rights and Privacy Act (FERPA).

B. Scheduling and Notice (see above).

C. Developing IEP (see above).

D. Record review.

- Parents must be given an opportunity to examine all educational records and to participate in all meetings about identification, evaluation, educational placement and the provision of a free appropriate education, and to obtain an independent educational evaluation of the child. 20 U.S.C. 1415(b)(1).

- When parents request records, make sure all records have been collected from all staff working with the child.

- Inform staff that parents have access to records.

E. Written notice.

- Parents must receive prior written notice whenever the district proposes to or refuses to initiate or change identification, evaluation, education placement or the provision of FAPE. 20 U.S.C. 1415(b)(3).

- The written notice must include a description of the proposed or refused action; an explanation of why the agency proposed or refused action; a description of other options considered and why those options were rejected; a description of each evaluation, test, record or report used as the basis for the action; a description of other factors that are relevant; a statement that parents have procedural safeguards and if not an initial referral for evaluation, how the description of procedural safeguards can be obtained; and sources for parents to contact to obtain assistance. 20 U.S.C. 1415(c)(1)-(7).

F. Procedural safeguards notice.

- Parents must receive copy of notice upon initial referral, upon notification of an IEP meeting, upon reevaluation, and upon registration of a complaint. 20 U.S.C. 1415(d)(1).

- The notice must include a full explanation of procedural safeguards, written in the parents' native language and in an easily understandable manner about independent educational evaluation, prior written notice, parental consent, access to educational records, opportunity to present complaints, the child's placement during due process proceedings, procedures for placement in interim educational setting, requirements for unilateral placement at private schools at public expense, mediation, due process proceedings, state-level appeals, civil actions and attorneys' fees. 20 U.S.C. 1415(d)(2).

VI. Thinking creatively:

A. Set agendas for meeting.

- Meetings should be scheduled for specific purposes; open-ended meetings generally end up in frustration because too many subjects are discussed without resolution.

B. Agree to have more than one meeting.

- This strategy allows for each member of the team to participate in the meeting and for complete exploration of the topic at hand.

- Preparation for each meeting becomes more thorough and specific.

- The sense of accomplishment this strategy brings creates better working relationships.

C. Agree to an interim IEP.

- Allowing for short-term placements gives time to collect data as to the appropriateness of the placement.
- Interim IEPs are an effective means to demonstrate the team's ability to cooperate and is a recognition that there are many ways to devise and implement IEPs.
- Be aware of what may be considered "stay put" placement and consider specific language in IEP to identify "stay put."
- When parents disagree, consider having parent sign limited consent on last page of IEP.

D. Commit to interim meetings with parents.

- Maintain close contact with parents to review the IEP so that they are apprised of any successes or concerns.
- The IEP should be a working tool that is modified as the needs of the student change; there is no obligation to have an IEP "set in stone."

E. Consider mediation or administrative review.

- When parents disagree, consider mediation or administrative review.
- IDEA requires giving parents opportunity to mediate. Mediation cannot be used to deny or delay parent's right to due process hearing. The state shall bear the cost of mediation. See 20 U.S.C. 1415(b)(5) and (e).
- IDEA requires giving parents opportunity to present complaints. See 20 U.S.C. 1415(b)(6).

F. Train staff.

- Special education law (particularly regular education staff).
- Problem solving.
- Curriculum development, inclusion, behavior plans, restraint, etc.

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- If administrators are not cognizant of student and staff needs in order to provide the training necessary to teach and implement the IEPs, the teacher union will bring staff training to negotiation.

- Training is essential to protect the school district from liability and the potential for negligence; a heightened duty of care may exist in some circumstances.

- Parents may be included in training in some circumstances.

G. Relationship with collective bargaining agreement.

- Do not commit to certain procedures in collective bargaining agreement that are contrary to IDEA.

- Consider whether bargaining agreement places limitations on teachers' meeting times and responsibilities.

- If union wants to get involved in particular student matter, consider confidentiality concerns under FERPA.

"Navigating Education Law Dissertation Waters to Safe Harbor and Professional Involvement"

I. Introduction—Joan Curcio

A brief discussion about why we wanted to do this and what we plan on accomplishing by the end of the session.

II. Where to begin?-Amy Abernethy

A. Choosing a topic
- Read the newspaper
- Read professional journals and magazines (Executive Educator, Chronicle of Higher Education, West's Education Law Reporter, ELA Notes)
- Talk to colleagues or professors about what's going on in schools (call the school board or staff attorney in your county or the general counsel at your institution—if someone is going to know what legal topics are currently "hot" it will be them. Also ask them to speculate about what legal issues they see arising in the future).

B. Choosing a committee
- Rules dependent upon institution—know graduate school and departmental policy
- Choose professors who you can work with and who can work with each other
- Plan for the unexpected

C. Sticking to timelines
- As much for yourself as for your committee members (Remember that after your coursework is done no one is sitting on your shoulder making sure you write your dissertation. It's totally up to you.

III. Research and Methodology—Louis Millhouse

IV. "Getting by with a little help from your friends"-Lois Berlin

A. Professional Involvement
- Books/articles
- Local, national, international presentations
- In-service workshops
- Conference attendance

B. The Cohort—Both formal and informal
- Each institution has hoops that students must jump through but the important thing is to not let them stand in the way of completing your dissertation. The important thing is to finish and be proud of your work and your accomplishment.

V. Professional Involvement

VI. Let's Begin a Network-Pass out a list and ask for:

- name
- address
- phone number
- e-mail
- position/school
- area of interest for research

APPENDIX A

(ABSTRACT)

AN EXPLORATION OF STUDENT-TO-STUDENT SEXUAL HARASSMENT AS SEX DISCRIMINATION IN HIGHER EDUCATION THROUGH ANALYSIS OF APPROPRIATE STATUTES AND CASE LAW

By

Amy Milford Abernethy

August 1992

Chair: C. Arthur Sandeen
Co-Chair: Joan Lois Curcio
Major Department: Educational Leadership

The purpose of this study was to examine existing sexual harassment statutes to determine if any of them provide a legal remedy to victims of student-to-student sexual harassment in higher education institutions. If current legal statutes were found not to extend such a remedy, a second purpose was to explore the expansion of present legal theories affording protection against sex discrimination of students to include student-to-student sexual harassment, especially through the use of Catharine MacKinnon's theories of dominance, inequality and sexual harassment as a form of sex discrimination.

The legal analysis revealed that the substantive case law concerning Title IX has expanded as knowledge of the sociological ramifications of sexual harassment have surfaced. The law of sexual harassment has been extended to the educational setting including remedies for sexual harassment of students by professors or administrators. It

is also clear that sexual harassment by peers in the workplace is remediable. Therefore, a remedy for student-to-student sexual harassment could well be the next step of protection provided by federal law, if the courts wish to take it.

An analysis of numerous cases has shown that some courts have adopted MacKinnon's theories of dominance, inequality and sex discrimination when deciding sexual harassment cases. The theoretical basis for an expansion of Title IX through case law is available to courts who are so inclined to use it through MacKinnon's theories.

It was recommended that further research be conducted including more recent Title IX cases to determine if such an expansion in case law has occurred. It was suggested that additional research be conducted concerning the increasing tension between the civil rights guaranteed under Title IX to be free from sex discrimination and the First Amendment right to free speech.

EXCERPT FROM CHAPTER 1

The Purpose of the Study

The purpose of this study was to examine existing sexual harassment statutes to determine if any of them provided a legal remedy to victims of student-to-student harassment in higher education institutions. If current legal statutes were found not to extend such a remedy, a second purpose of the study was to explore the expansion of present legal theories affording students protection against sex discrimination to include student-to-student sexual harassment through Catharine MacKinnon's theories of dominance, inequality and sex discrimination.

The research questions addressed were as follows:

1. Sexually harassing conduct by co-workers is prohibited by Title VII of the Civil Rights Act of 1964 because it is sex discrimination. Through the analysis of appropriate federal legislation and federal case law, what argument can be made that student-to-student sexual harassment is sex discrimination which should be prohibited by Title IX of the Education Amendments of 1972?
2. How do MacKinnon's theories of dominance, inequality and sexual harassment as a form of sex discrimination provide the theoretical means necessary to show that student-to-student sexual harassment is sex discrimination that should be prohibited by Title IX of the Education Amendments of 1972?

APPENDIX B

THE SUPREME COURT, RELIGION, AND THE INTENT OF THE FRAMERS OF THE CONSTITUTION: AN ANALYSIS OF THE SITTING JUSTICES' ESTABLISHMENT CLAUSE PHILOSOPHIES

by

Louis Milano Millhouse
Chair: Joan L. Curcio
Educational Leadership and Policy Studies

(ABSTRACT)

The purpose of this study is to determine the philosophical orientation of each sitting Justice on matters pertaining to the Establishment Clause of the First Amendment to the United States Constitution. A second purpose is to determine whether their philosophies change based on the issues involved.

The research questions that drove this analysis are:

1) What theories of original intent can be derived from the literature?
2) To which variation of original intent, separationism or nonpreferentialism, do the individual Justices subscribe?
3) What are the various Establishment Clause issues that have been heard by the Court?
4) Do the individual Justices' philosophies change depending on the issue?

By studying the text of the First Amendment, events surrounding its passage and other writings of the Framers of the Constitution, scholars have posited two theories of the original intent of the Framers to explain the meaning of "an establishment of religion."

The first theory is termed nonpreferentialism. Nonpreferentialists argue that government may support religion so long as that support is nondiscriminatory among religious sects. The second theory, separationism, states that government may not support one, any or all religions. Separationists argue that a "wall of separation" should exist between church and state while nonpreferentialists opine that no such wall was intended by the Framers.

The United States Supreme Court has jurisdiction over issues involving the establishment of religion. The individual Justices have certain predilections with regard to governmental support of religion and have written opinions in cases and scholarly articles in which they articulate their philosophies.

Using traditional legal research methods, this study has demonstrated that of the seven sitting Justices that have written opinions or scholarly articles pertaining the Establishment Clause, Rehnquist, Scalia and Thomas, are consistently nonpreferentialist in their philosophical orientation.

One justice, Stevens, is consistently separationist. Souter has written consistently separationist opinions, yet joined O'Connor's nonpreferentialist concurrence in one case. Kennedy, and O'Connor are neither consistently separationist nor nonpreferentialist. The philosophical orientation of those Justices changes based on the nature of the Establishment Clause issue.

APPENDIX C

PEER TO PEER SEXUAL HARASSMENT: EMERGING LAW AS IT APPLIES TO SCHOOL BUILDING ADMINISTRATORS' LEGAL RESPONSIBILITY FOR PREVENTION AND RESPONSE

by

Lois Fran Berlin

Committee Chair: Dr. Joan L. Curcio
Educational Administration

(ABSTRACT)

The purpose of this study was to closely examine relevant case law to determine if a legal argument exists that holds school administrators legally responsible for protecting students from peer to peer sexual harassment, particularly under federal laws. A second purpose of this study was to determine if a theoretical and/or regulatory base is available to support the argument. The research questions for this study were: (1) Does an argument emerge from analysis of appropriate case law and legislation that finds peer to peer sexual harassment to be sex discrimination that school administrators may be held legally responsible for preventing? (2) In addition to case law and legislation, what support can be found in the language and reasoning of scholarly writings, regulatory documents and case law dissents to forecast expanded judicial reasoning to hold school administrators responsible for protecting students from peer to peer sexual harassment?

A traditional methodology of legal research was

employed, using traditional legal finding tools and electronic data bases. An analysis of relevant court cases addressing sexual harassment was completed to establish and examine the judicial reasoning of the courts in those decisions.

The legal analyses conducted in this study showed that the cases of peer to peer sexual harassment heard in federal courts since 1989 have resulted in a pattern of decisions ruling increasingly in favor of administrators' legal responsibility for preventing peer to peer sexual harassment and their liability for failure to do so. While cases heard under Section 1983 of the Civil Rights Act of 1871 and the Due Process Clause were, with one exception, unsuccessful in assigning legal responsibility to school administrators, decisions in cases heard under Title IX of the Educational Amendments of 1972 have increasingly placed legal responsibility and liability on administrators. Two recent Title IX cases heard in federal appellate courts resulted in opposing decisions, a situation which sets the stage for a possible Supreme Court ruling on the issue.

Regulations and procedures enforced through state judiciaries and federal regulatory agencies, such as the Office of Civil Rights of the United States Department of Education, support the argument that school administrators are legally responsible when they knew of sexual harassment between peers and failed to stop the behavior. Scholars have advocated application of Title VII principles to Title IX, equating administrators' responsibility for protecting students from peer harassment to employer responsibility for preventing co-worker sexual harassment they knew or should have know about. And, finally, the dissents of two federal circuit court judges in cases decided in favor of defendant school districts have strongly favored holding administrators responsible for peer sexual harassment that they knew about and failed to stop.

Who Owns Intellectual Property used in the Electronic Classroom?

by

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A paper presented at the Annual Conference of the Education Law Association
at Charleston, South Carolina on November 19-21, 1998

Kenneth E. Lane is a Professor of Educational Administration at California State University, San Bernardino, teaching educational law and research. Dr. Lane received a $25,000 grant from his institution to develop his courses to be taught virtually through the Internet. Dr. Lane also serves as co-chair of the University Copyright Committee that develops policy regarding the use of materials in teaching both in the classroom and via distance learning.

Denny Van Berkum is an Associate Professor of Educational Administration at Moorhead State University in Moorhead, Minnesota, teaching educational law and principal preparation. Dr. Van Berkum teaches frequently through the use of interactive television, uses internet extensively for classroom discussion, and has dealt with issues related to "fair use" policies.

Michael D. Richardson is a Professor of Educational Administration at Georgia Southern University in Statesboro, Georgia, teaching educational administration courses. Dr. Richardson has written on legal issues related to teaching and administration.

Who Owns Intellectual Property used in the Electronic Classroom?

The electronic delivery of courses has become widespread internationally. Legal and ethical issues are arising at an ever-increasing rate. Traditionally, professor use copyrighted books, videos, taped recordings, and other such recordings in classrooms. With the advent of multimedia presentations and technologies such as web pages, professors are integrating these resources into original works providing greater flexibility for instruction and learning (Consortium of Colleges & University Media Centers, 1997). This development is requiring guidance and in-depth understanding of copyright laws and intellectual property as instructors develop courses, support materials, determine the posting of interaction, and Internet links for classes. Further, university officials and instructors are debating the ownership of the courses developed for electronic delivery including interactive television and the Internet.

As a pre-cursor to this discussing, it must be understood that the issues of intellectual property and copyright law are intertwined, not separate entities. Topics addressed in this paper are myths about intellectual property, a few issues on the relationship between intellectual property and copyright law, litigation, a university policy on intellectual property and suggested guidelines for dealing with intellectual property.

Myths about Intellectual Property

In order to fairly consider intellectual property issues, the discussion cannot be clouded by misconceptions. For this reason and as a starting point for thought on the subject, some myths are listed and rebutted here as adapted from a public domain article entitled "Some myths about intellectual property" (Public domain).

Intellectual property is an ancient principle

Intellectual property is an explicitly modern notion. The first patent law was in 1623 and the Statute of Anne, the precursor of modern copyright, came in 1710. These were severely limited in scope. The broader interpretation of these principles used in the Western world is quite modern with certain elements being added in the last few years.

Intellectual property is recognized worldwide

Intellectual property is not recognized worldwide. Note the conflict between the United States and China as a prime example of this not being true. It is predominately a United States policy objective to force this issue on other nations - an unwelcome form of intellectual imperialism all too frequently ignored by watchdog groups.

Without intellectual property, no one will produce original work

Given that intellectual property made its debut in 1623, we may correctly consider any work produced before this time to dispel the myth.

Intellectual property is necessary to create incentives for the production of original works

This myth has become the mantra of intellectual property supporters. Said often enough, some come to believe it. Sadly, they are mistaken: intellectual property rights are not essential to creation and in some circumstances even deter it. Consider the software industry. Free for years, the industry struggle from the limitations of intellectual property. It has become an industry with the most creative of environments in the modern world. With the advent of patent law into computing, however, many individual programmers live in fear of lawsuits from large corporations who claim "ownership" of techniques such as scroll-buffer. Intellectual property rights have always been about publishers and powerful firms as it has about creative individuals. The latter often find their interests poorly defended.

Even if people did create works without intellectual property protections, the quality of these works would be substandard

Only if "Julius Caesar", Plutarch's "Lives", "The Last Supper", and Handel's "Messiah" are "substandard"! All of these including such pivotal creations as the Bible, the Koran and the hundreds of Sutras were created in a world without intellectual property. Intellectual property boosters claim that weakening intellectual property law means giving up great literature, music and art. In fact, history shows us this is not the case.

To take away intellectual property rights is to deny creators the right to profit from their labors

This myth is based on the idea that the only way to make money off of creation is to "sell" the ideas which are produced. In fact, this is not true. Consulting, support, performance and service are all ways in which creators make money off of their abilities without appealing to intellectual property rights. Even if there were no copyright, money can be made and no better example is found than in academia where a great deal of idea production takes place without the ideas being "sold" to the universities which sponsor their creators. Removing intellectual property rights would not deny creators the right to profit from their labors; it would, however, allow all of society to share in the benefits of their works.

Intellectual Property and Copyright Issues

Using the Internet to teach and post materials changes the economics of content because it allows one to copy for free. On the Internet, it is easy to copy information although it may be difficult to find it. Intellectual property will continue to be distributed free and suppliers will increase dramatically in numbers. Thus, for supporters of intellectual property, the best course of action may be to distribute the intellectual property free in order to sell one's services and relationships (Dyson, 1995).

Realistically, any work posted on the Internet can be instantly copied and re-produced anywhere in the world. The use of login names and passwords for accessing intellectual property is not a deterrent. Computer hackers may break into the system or easier yet, students accessing the course can copy the materials and pass them along to other people. The question becomes how tightly do you want to control your materials? You can use login names and passwords to accomplish this with some success. However, you may bank on the fact that other students will have access to the materials through other students. Furthermore, other instructors at other universities will gain access to your material if they really want it.

Dyson (1995) describes the issue of posting intellectual property on the Internet best. She states:

> The question of what happens to intellectual property on the Net may be summed up like this: value shifts from the transformation of bits rather than the bits themselves, to services, to the selection of content, to the presence of other people, and to the assurance of authenticity - reliable information about sources of bits and their future flows. In short, intellectual assets and property depreciate while intellectual processes and services appreciate.

The Clinton Administration has proposed that the right to lend should not apply to digital works. This along with a narrower interpretation of fair use has the educational community concerned. If the Clinton administration proposal on intellectual property is approved by congress, the rights of people to browse, share, or make private non-commercial copies of copyrighted works will be rescinded. Your on-line service provider will be required to search your files to determine if you have unlicensed materials. The result would be that the public would be stripped of all the rights the copyright law has long recognized - including the rights of privacy (Samuelson, 1998).

Since the current Copyright Law protects the written works of a person for one's life plus 50 years, a case can be made that materials created by and posted on the Internet by an instructor for teaching purposes are protected. However, as pointed out vividly above, protected and free from copying on the Internet are not one in the same.

Furthermore, the very nature of the use of the WWW as a delivery system for distance education raises a question. How do the new technologies, such as compressed video and teleconferencing which allow professor to be electronically face-to-face with students in several locations at various times, affect the literal definition concerning a teachers interaction with a class that traditionally shared the same physical location.

A Selected Legal Discussion

Copyright protection is a form of protection provided to the authors of "original works of authorship" including literary, dramatic, musical, artistic, and certain intellectual works. This protection is available for both published and unpublished works and begins at the creation. According to the Copyright Act of 1976 (section 106), copyright owners have the exclusive right to 1) the reproduction of work, 2) prepare derivative works based on the original work, 3) distribute copies of the work, 4) perform the work publicly, and 5) display the work publicly. However in Section 107 of the act, the legal principle of "Fair Use" provides for certain limitations on the exclusive rights of the copyright holder. Four factors are identified to consider "fair use" on and individual bases: 1) the purpose and use, including whether such use is of a commercial nature or is for nonprofit educational purposes, 2) the nature of the copyrighted work (courts have favored nonfiction for fair use over fiction), 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole (even a small portion could be substantial if it constitutes a central or critical part of the original work), and 4) the effect of the use upon the potential market for or value of the copyrighted work.

As technologies change, so will the interpretation of the copyright laws change. Many cases have already been brought to the judicial system that challenge the previous interpretations of the copyright law in both civil and criminal courts. Recently commercial copyright violations involving more than 10 copies and of value of $2500 was made a felony. The first criminal case testing this copyright statute involved a computer Bulletin Board System (BBS) operator, Davey Jones Locker. He was sentenced to 24 months probation, six months home confinement, and loss of all computer equipment for distribution of copyrighted programs without permission of the publishers (O'Mahoney, 1998).

One of the first civil cases to test the copyright law in relationship to technology was *Sony Corp. v. Universal City Studio* (1984). The question presented to the Court was whether the sale of copying equipment (VCRs) to the general public violated any of the rights conferred upon the broadcasting industry by the Copyright Act. The court answered no stating that the primary use of the machine for most owners was "time-shifting", the practice of recording a program to view it once at a later time and thereafter erasing it. Time-shifting enables viewer to see the programs they otherwise would miss. Further, the Court recognized that a substantial number of owners do collect a library of recorded programs but no evidence was given for decreasing television viewing. Nowhere in the Act is there evidence that the Congress has made it unlawful to copy a program for later viewing at home, or has enacted a prohibition against the sale of machines that make such copying possible. Finally, the Act does not expressly make anyone liable for infringement committed by another.

A Scottish case (*Shetland Times, Ltd. v. Will*, 1996) provides insight into potential problems in setting links for a course or web page. In this case, the Shetkand Times (The Times) asked the court to temporally prevent the Shetland News (The News) from maintaining that the links constituted infringement to copyright. The Times operates a site on the WorldWide Web (WWW) which makes available many of the articles in the printed version of its newspaper. The "front page" of the Times' site consists of a number of new headlines with embedded links to corresponding articles. The News, a competitor to the Times, also operated a web site. The News had reproduced, on its own front page, the headlines appearing on the Times' front page and linked them to articles on pages created and maintained by the Times, bypassing the front page of the Times. The Times claimed that the News, by linking to a subsidiary story page in the Times' web site creates the appearance that the proprietary stories published by the Times originated at the News' web site. They insist that the defendant's links should be to their home page. The presiding judge agreed that the Times had presented a prima facie case of copyright infringement based upon the United Kingdom's law governing cable television providers (Tysver & Bolin, 1996).

The case of *Princeton University Press v. Michigan Document Services (MDS)* (*1996*) brings before us the issues of fair use of publisher's materials in the creation of course packets for student at nearby universities. Course packets have often contained journal articles, newspaper articles, course notes, syllabi, sample test questions, and excerpts from books. MDS created the course packets for professors and student at nearby universities. MDS added a table of contents identifying each work by author and name of the work, and gave the course packets page numbers and a binding. They charged a fee per page that was the same regardless of the content or copyright status of the pages and sold its course packets only to students for particular courses. Princeton University Press and St. Martin's Press challenged based upon violation of copyright base upon the duplication of copies for sale by a for-profit corporation that failed to pay royalties. The lower court ruled in their favor. However, in February of 1996 the Sixth Circuit Court reversed the opinion of the lower court and found that MDS made a fair use of the plaintiff publishers' materials in the creation of course packets for professors and students at the nearby universities. That same year the Sixth Court withdrew its opinion and *en banc* rehearing issued a new opinion affirming the lower court's opinion on infringement, but not finding a willfulness in the act. The found that MDS is a commercial copy shop that reproduce substantial segments of copyrighted works of scholarship, bound the copies into " course packets" and sold them to students. The excerpts examined contained plaintiffs' publications ranging in size from five percent to thirty percent of the material in each publication. They did find, however, that the defendants' belief that their copying constituted fair use was not so unreasonable as to be considered willfulness.

A case started in 1997, *Ticketmasters Corp. v. Microsoft Corp.* offers insight into the use of trademarks and links that limit displays intended to be view by an audience when the web site is opened. In this case, Ticketmasters claimed that the "Seattle Sidewalk" guide on Microsoft's Web site illegally used the name of Ticketmaster and trademark by providing links that "circumvented the beginning pages of Ticketmaster's Web site, which displays advertisements, products and services of entities with which Ticketmaster contracts and have linked to the subsidiary pagers of the website. Further, Ticketmaster alleged that Microsoft was profiting for the Ticketmaster name and that Microsoft was using Ticketmaster's content to generate advertising revenue. The courts found that the domain name identical to another's federally registered trademark is infringement. Trademark infringement can also occur when a site utilizes the mark of another, creating confusion with the consuming public. The seamless connection that occurs when a link is activated and a user is relocate from one web site to another may cause a blurring in the distinction between the proprietary material of the original site and that of the linking sites. If the link embedded in the text is distinguished by a proprietary image or logos, then trademark infringements may occur (Madoff, 1997).

University Intellectual Property Policy

Today, many universities have limited policies or no policies at all concerning the use of intellectual property. "The lack of guidelines for educational multimedia places a huge burden on educators to take advantage of today's teaching technologies (Daziel, 1997, p.9). For example, California State University, San Bernardino, has had an intellectual property policy in place since December, 1993. While the policy addresses primarily inventions and discoveries, it is aimed at ensuring the protection of the traditional rights of university scholarship and the facilitation of that protection. The policy does state that all discoveries and inventions that occur are the property of the university unless the inventor can clearly demonstrate that "no University time or facilities were used." However, the policy does not address the posting of intellectual property on the Internet when teaching classes. Why? The policy is outdated. When it was created, teaching on the Internet was not being done or considered as a possibility. The policy is now being reviewed in light of the University copyright Committee's work in creating a workable policy for the campus community addressing both copyright and intellectual property.

Suggested Guidelines

Based upon the uncertainties associated with posting materials on the Internet for teaching purposes, the following guidelines are suggested by the authors and found in the Fair Use Guidelines for Educational Multimedia (1997):

- Do not post anything you do not want copied.
- Consider membership to or subscription to your course pages residing on the Internet.
- Consider login names and passwords to protect your materials and copyrighted materials.
- Incorporate only portions of lawfully acquired copyrighted works in your multi-media presentations.
- Consider the use of published software for Internet teaching such as WebCT and Web Sentinel.
- Place a copyright statement on the homepage your create for your course(s).
- Consult with your University to decide whether the material including graphics, video clips and pictures are the property of the University or whether the university will enter into a signed agreement that those materials are owned by you personally.
- Decide whether you are more interested in financial gain or sharing openly and freely your ideas in teaching via the Internet. This decision will guide your actions in posting materials.
- Lawfully acquired copyrighted materials may be used for a period of up to two years. For use beyond that time, you should seek additional approval.
- All Students in your classes should be instructed about the reasons for copyright protection.
- Seek individual permission before using copyrighted works in educational multimedia projects for distribution.
- Be cautious in down loading material for the Internet. A mix of works protected by copyright and works in public domain exist on the network. The mere fact the work is published on the Internet does not automatically indicate that the material may be copied.
- Exercise integrity when altering another's works and advise your audience to the alterations.

Conclusion

The issue of intellectual property and copyright is not an easy or clear-cut. The ease of use of materials on the Internet makes enforcement of copyright and intellectual property rights extremely difficult. Maybe in the long run, it all boils down to what we believe about ideas. Maybe it is time to consider what Thomas Jefferson said almost 200 years ago:

> If nature has made any one thing less susceptible than all others or exclusive property, it is the action of the thinking powers called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives and idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she make them, like fire, expandable over all space, without lessening their density at any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject or property.

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"THE RUMORS OF MY DEATH HAVE BEEN EXAGGERATED: *BAKKE'S* ROLE IN HIGHER EDUCATION AFTER *HOPWOOD*"

by

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I. Introduction

A. *"Twill be recorded for a precedent [,] [a]nd many an error by the same example [w]ill rush into the state."* [1]

Shakespeare's lament has been echoing across the academic arena since the decision in *Hopwood v. Texas*. In *Hopwood*, the United States Court of Appeals for the Fifth Circuit held that student body diversity in higher education can never serve as a compelling justification for racial classifications.

However, the *Hopwood* decision flies in the face of the United States' Supreme Court's seminal decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), where the Court held that diversity may serve as a compelling justification for a race-conscious admissions scheme.

The central issue is: **to what level may the government take cognizance of race, or other suspect classifications, in an effort to level the playing field in a variety of settings?**

B. **"To Be"** [2] – Diversity as a Compelling Justification:

Regents of the University of California v. Bakke, 438 U.S. 265 (1978). Plurality decision (5-4) held admissions program violated Title VI of the Civil Rights Act of 1964 and equal protection when racial quotas used in a state school to deny admission to a white student with above average qualifications. Under the university's medical school admissions program, 16 out of 100 seats were exclusively reserved for disadvantaged minority students and were subject to lower criteria than the other 84 seats.

Steven's plurality:

Struck admissions policy under Title VI because race as a class was determinative. (*Bakke*, 438 U.S. at 412-3.)

Brennan's plurality:

Would uphold the racial classification under constitutional intermediate scrutiny if the use of race was benign and did not impugn "those least represented in the political process." *Bakke*, 438 U.S. at 357-58, 361-2 (Brennan, J., dissenting).

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[1] Todd E. Freed, *Is Stare Decisis Still the Lighthouse Beacon of Supreme Court Jurisprudence?: A Critical Analysis*, 57 Ohio State L.J. 1767 (1996) (quoting William Shakespeare, The Merchant of Venice act 4, sc.1 (Jay L. Halio ed., Oxford Univ. Press (1993)).

[2] William Shakespeare, Hamlet act 3, sc.1.

Powell's concurrence:

Struck admissions policy under strict scrutiny but announced that "the attainment of a diverse student body … [is] clearly… a constitutionally permissible goal for an institution of higher education", *Bakke*, 438 U.S. at 311-12. Affirmative action may be constitutional as long as the classification is remedial, not overinclusive, and does not denigrate the rights of white students.

C. "***Or Not To Be***"[3]– the Fifth Circuit's Divergence from Precedent

Hopwood v. Texas, 78 F.3d 932 (1996), *cert. denied*, 514 U.S. 581 (1996). Held admissions policy dividing students into three categories (presumptive admit, discretionary zone, presumptive deny) violated Title VI and equal protection under strict scrutiny. Ignored precedent and cited subsequent cases that ostensibly relate to *Bakke* in order to announce that diversity can never be a compelling state interest and that diversity can not be used to implement racial classifications.

D. Litigants must **narrowly carve out an exception for higher education** to protect college and university admissions policies from a possible general condemnation of affirmative action by the Court.

E. Generalizing the affirmative action attacks under the rubric of "reverse discrimination" disparages the **unique role of affirmative action in higher education**.

Affirmative Action Attacks

1. Although *Hopwood* only applies to college admissions in the Fifth Circuit, other states may rely on the decision and Texas schools have gone as far as altering permissible minority financial aid programs in response. *See* Michael A. Olivas, Constitutional Criteria: The Social Science and Common Law of Admission Decision in Higher Education, 68 U. of Colo. L. Rev. 1065, 1109-1110 (1997).

2. *Podbersky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995) (disallowing race-based financial aid program).

3. *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997) (upholding California's Proposition 209 eliminating racial and gender preferences in public employment, education, and contracting)

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[3] *Id.*

4. *Taxman v. Piscataway Township Board of Education*, 91 F.3d 1547 (3rd Cir. 1996), cert. dismissed, 118 S. Ct. 595 (1997) (striking down school board decision to fire a white teacher and to retain African-American teacher for the sake of diversity).

5. Center for Individual Rights (CIR), an anti-affirmative action group that successfully brought the suit in *Hopwood*, has filed suit against the University of Michigan and the University of Washington based on reverse discrimination claims. *See Gratz v. Bollinger*, No. 97-75231 (E.D. Mich., filed Oct. 4, 1997); *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich., filed Dec. 3, 1997); *Smith v. University of Washington Law Sch.*, No. 970335 (W.D. Wash., filed Mar. 15, 1997). Also, CIR is aiding in placing Initiative 200 on the November 1998 ballot in the state of Washington.

Affirmative Action Support

1. *Taxman v. Piscataway Township Board of Education*, 91 F.3d 1547 (3rd Cir. 1996), cert. dismissed, 118 S. Ct. 595 (1997) was scheduled for argument in the Supreme Court, but the parties settled before oral arguments. The settlement in *Taxman* was funded in large part by pro-affirmative action groups, like the Black Leadership Forum, to avoid an adverse ruling.

2. Justice Brennan, who voted to hear an earlier affirmative action case, voted not to hear *Bakke* based upon fears of what the now conservative court might decide. The composition of the Court had changed with the addition of President Nixon appointees Chief Justice Burger, Justice Powell, Justice Rehnquist, and Justice Blackmun. *See* Bernard Schwartz, Behind Bakke: Affirmative Action and the Supreme Court 96 (1988).

3. The First Circuit stated the philosophical and legal underpinnings of affirmative action in *Associated Gen. Contractors of Mass., Inc. v. Altshuler*, 490 F.2d 9, 16 (1st Cir. 1973), *cert denied*, 416 U.S. 957 (1974): "It is by now well understood… that our society cannot be completely color blind in the short term if we are to have a color blind society in the long term. After centuries of viewing through colored lenses, eyes do no quickly adjust when the lenses are removed."

4. Labor Management Act, 29 U.S.C.A. §§ 141 *et seq.* (West 1996) (origin of term "affirmative action"). Civil Rights Act of 1964, 42 U.S.C.A. §§ 1971, 1975a-1975d, 2000a-2000h-6 (West 1996) (utilizing affirmative action in Titles VI and VII forbidding discriminatory activity and creating remedies for non-compliance). Affirmative action has served as a broad rubric under which much of the civil rights movement could be said to fall.

5. **Institutions of higher education across the country have relied on the holding in *Bakke* to formulate admissions policies utilizing racial classifications.**

II. Defending *Bakke*.

A. The Fifth Circuit Unconstitutionally Ignored Valid Supreme Court Precedent in *Bakke*

"If Bakke *is to be declared dead, the Supreme Court, and not a three-judge panel of a circuit court, should make that pronouncement."* [4]

"Lest there be any doubt, we are firmly convinced that, until the Supreme Court expressly overrules Bakke, *student body diversity is a compelling governmental interest for the purposes of strict scrutiny."* [5]

The court in *Hopwood* claimed Powell's use of diversity never had any value as precedent. However:

1. It is unclear which way Brennan's plurality opinion cuts.
2. Higher education admissions have relied on *Bakke* as a blueprint.
3. The Supreme Court has acquiesced in *Bakke* for 20 years.

B. The cases the *Hopwood* court relied upon were totally unrelated to higher education admissions programs and only serve to support the notion that racial classifications will be viewed under strict scrutiny.

1. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Struck down minority set-aside program (30% quota system) city promulgated to remedy past societal discrimination. Announced that strict scrutiny is the proper standard in state cases, just like *Bakke* announced strict scrutiny is the proper standard in federal cases. Also utilized *Bakke* considerations and analogized affirmative action outside higher education. **Such analogies do not work backwards and weaken the concept of affirmative action in higher education. The Court in *Crosen* was not determining the role of diversity in higher education or elsewhere.**

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[4] *Hopwood*, 78 F.3d 932, 945-46 (Wiener, J., specially concurring).

[5] *Hopwood*, 84 F.3d 720, 724 n.11 (Politz, King, Wiener, Benavides, Stewart, Parker, Dennis, JJ., dissenting from denial of rehearing en banc).

The *Hopwood* court adopted O'Connor's plurality opinion in *Crosen* to debunk Powell's diversity rationale. However, **O'Connor supported Powell's concurring opinion and the Court could easily have dismissed the diversity rationale, but did not.** Indeed, "If a precedent of this Court has direct application in a case, yet appears to rest on reasoning rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

2. *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.s. 547 (1990), overruled by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). *Metro Broadcasting*'s use of intermediate scrutiny was overruled when *Adarand* announced strict scrutiny as the appropriate test when evaluating racial classifications. **The Court in *Adarand* never confronted whether diversity was a compelling interest. Instead, the court clarified that strict scrutiny is not to be "strict in theory, but fatal in fact" and noted that a court should consider reliance on prior decisions,** just *Bakke* has "engendered substantial reliance" in higher education admissions for the past 20 years.

3. *Wygant v. Jackson Bd. of Education*, 476 U.S. 267 (1986). Held collective bargaining agreement giving teachers of colors preferential protection from layoffs in violation of Title VII and equal protection under a strict scrutiny analysis. **The Court did not determine that diversity could never be a compelling interest. In fact, O'Connor's stated in concurrence that "racial diversity has been found to be sufficiently 'compelling' at least in the context of higher education to support the use of racial considerations in furthering that interest."**

C. Equal Protection

1. The *Hopwood* court missed the distinction that the race assumed to be disadvantaged by racial classifications in higher education (whites) is not the race that has been stigmatized (African-Americans).

2. The *Hopwood* court attempted to make strict scrutiny "fatal in fact."

3. The *Hopwood* court should have narrowed its constitutional holding by invalidating the Texas admissions program as not narrowly tailored (the program was not competitive and race served more than a "plus factor").

4. The *Hopwood* court deliberately overstepped its bounds to discredit the role affirmative action plays in society.

III. The Importance of *Bakke* to Higher Education

A. *Bakke* served as legal and psychological support against re-segregation.

1. Minority admissions in public law schools in Texas dropped by an average of 24 percent after *Hopwood.* Likewise, after passage of Proposition 209, the University of California-Berkeley did not admit a single African-American student for the 1997-8 school year.

2. The Court has long recognized the imperative of the government taking proactive steps of a remedial nature with regard to racial desegregation. *See Brown v. Board of Education*, 313 U.S. 713 (1954). The Court compelled specific affirmative remedial measures that would end segregation. *See Swann v. Charolette Mecklenburg Bd. of Education*, 402 U.S. 1 (1971) (overturning circuit court opinion and permitting cross-town busing in school district). See also *Keys v. School District No. 1*, 413 U.S. 189 (1973) and *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979).

3. Litigants outside education have sought to capitalize upon the affirmative action gains made in the education context. Now criticisms of affirmative action in government contracts and employment are being extended to reach the educational roots of affirmative action. **Unless a bright line is drawn between diversity in education and other arenas, affirmation action in education will be jeopardized and signal the end of *Bakke*, ultimately resulting in the re-segregation of higher education.**

B. Under *Bakke*, race cannot be determinative as it was in *Croson, Metro Broadcasting,* and *Adarand.*

In *Bakke*, Powell explained that it is constitutional to achieve diversity through racial classifications when race is a factor, just not the factor. The current conservative Supreme Court will not tolerate quota programs.

C. *Bakke* implicitly supports diversity in higher education and must be distinguished from the use of the diversity rationale in arenas outside education.

1. The unique nature of higher education has been accepted since *Sweatt v. Painter,* 339 U.S. 629 (1950), and *McLaurin v. Oklahoma State Regents for Higher Education,* 339 U.S. 637 (1950).

2. What may be appropriate in higher education may not be appropriate in other conflicts. The Supreme Court is not quick to graft one kind of

constitutional protection on to another. *See eg, Gebser v. Lago Vista Independent School District*, 118 S.Ct. 1989 (1998)(refusing to use Title VII's employment principles on student's Title IX's sexual harassment claim because the goals of employment differ from the goals of education).

3. The university's interest in diversity is prospective while the equal protection clause is retrospective. Therefore, it is not appropriate to scrutinize the mission of the university under an equal protection analysis.

4. Higher education is not subject to the same zero sum analysis that exists in the workplace because the ends are different, even if the means are similar.

5. Race as a factor in higher education admission does not unnecessarily infringe upon the rights of non-minority applicants, but rather diversity enhances the educational experience of non-minority students.

6. Admissions programs already take diversity into account through informal means (GPAs, standardized test scores, personal statements).

7. If society's goal is to promote equality in the workplace, it must begin, as always, in the educational environment. Educational opportunities are a requisite to further the compelling social interest of equality and justice.

IV. Guidelines for educational administrators

A. College and university admissions programs must defend the use of racial classifications by separating themselves from the employment related affirmative action debate.

B. Administrators must scrutinize policies and ensure that race is taken into account in a permissible manner and that policies are not premised on quota systems.

C. Admissions programs must consider diversity in order to continue the viability of *Bakke*.

D. Under *Bakke*, university policies that utilize race as a factor must survive strict scrutiny to be perceived by a court as constitutional. Guidelines which can survive this strict scrutiny analysis are as follows:

1. Admissions programs that use race or national origin as a quality for consideration must be show to have a remedial purpose with proof of manifest racial imbalance. In addition, nay plan must be carefully analyzed to ensure that racial and national-origin preferences are not implements so as to unnecessarily trammel the interests of white students.

2. Affirmative action programs challenged under the Equal Protection Clause of the Fourteenth Amendment are likely to be unconditional unless designed to meet a compelling state interest; even if a compelling state interest is found, the program will not be constitutional unless narrowly tailored to meet legitimate university goals.

3. Any affirmative action program should be viewed in the university not as a permanent educational policy, but rather as a temporary corrective device that will no longer be necessary, or legally acceptable, once adjustments have been made.

4. Complaints that are brought under both Title VI and the Equal Protection Clause will be evaluated under the more stringent constitutional standard. To minimize risks of liability, college and university officials who desire or are forced to create affirmative action polities should do so according to the requirements of equal protection. Following the opinion of Justice William Powell in the *Bakke* decision, outside the federal Court of Appeals for the Fifth Circuit and the State of California, race may be used as a factor and not the factor in admissions decisions.

Note on Powell's reference to whites as "innocent victims" forced to bear "burdens… not of their own making." *Bakke*, 498 U.S. at 298 (Powell, J. concurring).

Justice Marshall, in dissent, attacked Powell's reference to white students as innocent victims, and ipso facto, blacks being the receptions of windfall admissions: "It is unnecessary in 20th Century America to have individual [African-Americans] demonstrate that they have been victims of raical discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact." *Id.* at 300 (opinion of Marshall, J.) Justice Marshall's dissent has had no affect upon federal courts in any of the subsequent affirmative action rulings. Black progress has been circumscribed by the interest of the white majority. *See, e.g., Fullilove, v. Klutznick*, 448 U.S. 448 (1980*); Wygant v. Jackson v. Bd. of Education*, 476 U.S. 448 (1986*); City of Richmond v. J.A. Crosen, Co.*, 488 U.S. 469 (1989).

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Types of Student Speech

"school-tolerated" speech	**"school-sponsored" speech**	**"vulgar" speech**
speech that merely happens to occur on school property	school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school	Speech that is "vulgar, lewd, obscene, and plainly offensive," although not necessarily legally "obscene"
a school can regulate "school-tolerated" speech only where the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."	a school can place restrictions on "school-sponsored" speech so long as the restrictions are "reasonably related to legitimate pedagogical concerns"	a school may prohibit "vulgar speech," regardless of whether the speech causes a substantial disruption
Tinker v. Des Moines Indep. Comm. Dist., 393 U.S. 503, 89 S. Ct. 733 (1969).	***Hazelwood School District v. Kuhlmeier***, 484 U.S. 260, 108 S.Ct. 562, 569-70 (1988).	***Bethel School District No. 403 v. Fraser***, 475 U.S. 675, 106 S.Ct. 3159 (1986).

NOTE: the "vulgar speech" test from *Fraser* is a little more controversial than the other two tests. Decided between *Tinker* and *Kuhlmeier*, *Fraser* does not purport to set out any "tests," and some courts have read *Fraser* as finding a material and substantial disruption justifying its restrictions under *Tinker* (and thus not establishing a separate test).

ANATOMY OF A DECISION:

Phillips v. Anderson County School District Five, 987 F. Supp. 488 (D. S.C. 1997).

The Facts

Kinley, a middle school student, filed suit after he had been suspended for refusing to take off a jacket made to look like the Confederate Battle Flag. After Kinley refused to take off his jacket, he was suspended for three days. He returned to school with his father, wearing the jacket, and after he refused to take it off again, he was suspended for another five days. A deadlock ensued after that, with the school refusing to allow Kinley to wear the jacket, and Kinley's father refusing to return Kinley to school unless he could wear the jacket.

The Policy

Lakeside Middle School had a dress code policy that provided that "attire should not interfere with classroom instruction" and that "[o]ffending students will be advised to correct their dress problem or visit the office where a parent will be called to bring appropriate clothes or pick up the student."

Lakeside policy also required all students to obey school personnel.

The Decision

The court found that the school did not violate Kinley's First Amendment rights, because under *Tinker* the school had a reasonable basis for predicting that Kinley's jacket would produce a substantial and material disruption of and interference with the educational process at Lakeside

The Student's Argument

School officials could not rely on prior disruptions at Lakeside in predicting a "substantial and material disruption," because such disruptions had taken place outside of the "context of classroom instruction."

The Court's Response

"Nor can it be reasonably contended that arguments or fights which occur immediately before or after a class have no disruptive effect upon the teaching and learning process during actual class time."

Was The Policy Vague?

NO!

i) the school had a fairly well-known history of discipline problems arising from Confederate flag clothing;
ii) Kinley himself had been involved in previous problems;
iii) school officials asked Kinley to remove the jacket and waited for his refusal before imposing any punishment.

CHRIS' TOP TEN LIST OF THINGS TO CONSIDER WHEN DRAFTING A DRESS CODE POLICY

- In most dress code disputes, courts are likely to find in favor of the student, unless facts exist that would reasonably lead school officials to forecast substantial disruption of or material interference with school activities.

> The court found that prohibiting a student from wearing a t-shirt that read "[t]he best of the night's adventures are reserved for people with nothing planned" violated the student's First Amendment free speech rights when no evidence existed of any disruption

McIntire v. Bethel School, Independent School District No. 3, 804 F. Supp. 1415 (W.D. Okl. 1992)

- Schools may prohibit obscene, lewd or vulgar clothing, but must be careful when drafting policies that discriminate against speech on the basis of content

> Two brothers challenged the school dress code policy after being told they could not wear t-shirts that read: "See Dick Drink. See Dick Drive. See Dick Die. Don't be a Dick," and
> "Coed Naked Band: Do It To the Rhythm."

Pyle v. South Hadley School Committee, 861 F. Supp. 157 (D. Mass. 1994)

- The court considered two provisions of the school dress code
    - One: Thou Shalt Not Wear Clothing That "[h]as comments or designs that are obscene, lewd or vulgar"
        - ✓ the court ruled that schools could prohibit such speech under *Fraser* regardless of whether the speech has caused a substantial disruption.
        - ✓ the court rejected the argument that the "See Dick" shirt was really a political (anti-drinking) message: "At least in high school, a political message does not justify a vulgar medium."
    - Two: Thou Shalt Not Wear Clothing That "[i]s directed toward or intended to harass, threaten, intimidate, or demean an individual or group of individuals, because of sex, color, race, religion, handicap, national origin, or sexual orientation"
        - ✓ the court declared this provision unconstitutional, because such a provision was aimed directly at the content of the speech, and not at its potential for disruption or vulgarity.

- Make sure that school administrators be able to explain why a dress code policy was passed and what prompted the specifics of the dress code.

> At least one court reversed the summary judgment decision of a lower court upholding an anti-gang dress code because, although there was evidence of a gang problem and evidence that the dress code addressed that gang problem, there was nothing in the record showing that the principal had passed the specific dress code *because of* the gang problem.

Adams v. Township of Redford, 85 F.3d 628, 1996 WL 250578 (6th Cir. 1996)

- Beware of relying overly much on vague "anti-gang" rhetoric to justify a dress code.

> A California court that upheld an anti-sports dress code only did so at the high school level; it struck down the same dress code at the middle and elementary schools because there was no evidence of a gang problem at those levels.

Jeglin v. San Jacinto Unified School District, 827 F. Supp. 1459 (C.D. Cal. 1993)

- "Anti-gang" dress restrictions must be drawn very carefully.

> A school district's ban on "gang-related" apparel was found to be "void for vagueness" and to violate a student's free speech and free exercise rights.

Chalifoux v. New Caney Independent School District, 976 F. Supp. 659 (S.D. Tex. 1997).

- two students were told they could not wear their rosaries outside their clothing on school property because it violated the District's ban on "gang-related" apparel.
- the court found that the rosaries were symbolic speech protected by the First Amendment, and that the right of the students to wear the rosaries should be analyzed under *Tinker*.
- Although the court agreed that schools are entitled to some degree of flexibility in drafting disciplinary rules, the New Caney policy was found to be void for vagueness
    - the policy did not adequately define "gang-related apparel"
    - the policy also gave too much discretion to school officials to define what they felt was "gang-related apparel" on a somewhat *ad hoc* basis.
- the court also found that the dress code policy violated the rights of the students under the Free Exercise Clause of the First Amendment.

  - the court required the students to show that they held a sincere religious belief that was burdened by the school's dress code regulations.

  - the court rejected the argument that wearing the rosaries was not protected by the First Amendment because it was neither required by the Catholic faith nor common among practicing Catholics, mainly on the grounds that it was undisputed that these particular students wore the rosaries for religious reasons.

  - the court analyzed the dress code under a hybrid free exercise/free speech claim, which subjected the policy to a more rigorous standard of review:

    > The court required the district to show that the regulation bore "more" than a reasonable relation to its stated purpose. The court then balanced that showing against the burden placed on the students' religious exercise.

- While the court did not dispute that dress codes might be appropriate under some circumstances for regulating gang activity, it ruled that there had to be more effective means to control gang activity than a blanket ban on wearing rosaries, especially under the facts before the Court.

✏ Students do not have a constitutional right to wear baggy pants

> A New Mexico student sued his school district, claiming that the school dress code, which forbade wearing sagging pants as part of anti-gang measures, violated the student's First Amendment free speech right to wear baggy pants.

Bivens v. Albuquerque Public Schools, 899 F. Supp. 556 (D. N.M. 1995)

- the court noted that even if wearing sagging pants was protected speech, the anti-gang goals of the dress code might be enough to surmount the student's rights.

- Test for when non-verbal conduct can be considered "protected expression"
  The plaintiff must show:

  (1) an intention to convey a particularized message; and

  (2) a great likelihood that the message would be understood by those who observe the conduct.

- Bivens was able to verbalize a particularized message--an attempt to show a link to his black identify and black culture--he could not show that others would understand the message.
    - his sagging pants were more likely to be seen as a sign of gang affiliation.
    - "not every defiant act by a high school student is constitutionally protected speech."

✏ As with most restrictive rules in the school setting, the courts appear more inclined to uphold rules aimed at younger children (i.e. elementary students) than they do with rules aimed at the older children, especially high school students.

> In ruling that the law regarding dress codes is still unsettled, the court held that the right of an elementary school student to wear shirts saying "Unfair Grades" and "Racism" was not clearly established, even under *Tinker*.

Baxter v. Vigo County School Corporation, 26 F.3d 728 (7th Cir. 1994)

✏ Paradoxically, the broader the ban, the more likely it is to be upheld.

> Banning shirts with specific sayings (*i.e.* the alcohol take-off) has been frowned on unless the school could show actual disruption caused by the shirt. Banning classes of clothes (*i.e.* sports clothing or baggy pants) has generally been upheld, especially where the school could articulate a plausible theory behind the dress code.

McIntire v. Bethel School, Independent School District No. 3, 804 F. Supp. 1415 (W.D. Okl. 1992)
Jeglin v. San Jacinto Unified School District, 827 F. Supp. 1459 (C.D. Cal. 1993)

✏ What should I do if a male student challenges our school's hair-length regulation on the grounds that it violates his constitutional rights?

First:
Figure out what the law is in your circuit on hair-length regulations:
It varies from circuit to circuit!

- The Fifth Circuit declared in 1972 that male students do not have a constitutional right to wear their hair long. *Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972)

    ✏ "Where the complaint merely alleges the constitutional invalidity of a high school hair and grooming regulation, the district courts are directed to grant an immediate motion to dismiss...." *Id.* at 618.

- The Eighth Circuit declared in 1971 that students have a constitutionally-protected right to govern their own appearances. *Bishop v. Colaw*, 450 F.2d 1069, 1075 (8th Cir. 1971).

  - Although the court held that this right was not absolute, and that the school could infringe on the students' rights if "necessary" in order to carry out is educational mission, it rejected the vague and unsubstantiated fears of administrators that long hair would cause disruptions.

Second:

Check your state courts to make sure that they have not established a different rule under your state constitution.

Example:

In the 1990s, the Texas Supreme Court has twice considered equal protection challenges to school district hair-length regulations, once under the Texas Constitution Equal Rights Clause, *see Barber v. Colorado Independent School District*, 901 S.W.2d 447 (Tex. 1995), and once under a state statute guaranteeing equal rights for students. *See Board of Trustees of Bastrop Indep. Sch. Dist. v. Toungate*, 958 S.W.2d 365 (Tex. 1997). Although in both occasions the Court sided with the Fifth Circuit's *Karr v. Schmidt* decision and ruled that a male student does not have a protected right to wear his hair long, the *Toungate* Court overturned a bitter appellate court decision siding with the student in his dispute with the school district.

Third:

If you are in a circuit and state that allows schools to regulate the hair length of male students, find out why the student wants to wear his hair long....

A Texas school district was enjoined from enforcing its dress code against American Indians students, which would have required the students to cut their hair, because it would violate the free speech and religious rights of the students.

Alabama & Coushatta Tribes v. Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319 (E.D. Tex. 1993)

Tipper Gore may have been right....

school district may prohibit students from wearing New Kids on the Block concert t-shirt that says "Drugs Suck!" because of a reasonable forecast of disruption arising out of the sexual connotations of "suck". *Broussard v. School Board of the City of Norfolk*, 801 F. Supp. 1526 (E.D. Va. 1992)

44TH ANNUAL EDUCATION LAW ASSOCIATION CONFERENCE
CHARLESTON, SOUTH CAROLINA
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COMPLIANCE WITH TITLE IX IN ATHLETIC PROGRAMS

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I. TITLE IX REQUIREMENTS

A. Statutory and Regulatory Provisions

1. Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 *et. seq.*) prohibits discrimination on the basis of sex in educational programs or activities which receive federal financial assistance:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance....

2. The statute is not program-specific. *See* Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687, *overruling Grove City College v. Bell*, 465 U.S. 555 (1984).

3. The Title IX regulations contain two provisions which apply specifically to athletic programs at educational institutions:

   a. 34 C.F.R. § 106.37 addresses the issue of financial aid based on athletic ability in intercollegiate athletics:

      (1) Schools cannot discriminate based on gender in awarding financial aid.

      (2) Single sex grants, etc. may be awarded so long there is no discrimination in the financial aid program as a whole.

      (3) Schools must provide reasonable opportunities for athletic scholarships for members of each sex in proportion to the number of students of each sex participating in athletics.

b. 34 C.F.R. § 106.41 prohibits discrimination on the basis of sex in athletic programs and mandates that schools provide equal athletic opportunity to members of both sexes:

  (1) This regulation applies to elementary and secondary programs, as well as to post-secondary athletic programs.

  (2) 34 C.F.R. § 106.41(c) lists ten factors that should be considered in determining if equal opportunities are available:

    (a) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.

    (b) Provision of equipment and supplies.

    (c) Scheduling of games and practice.

    (d) Travel and per diem allowance.

    (e) Opportunity to receive coaching and academic tutoring.

    (f) Assignment and compensation of coaches and tutors.

    (g) Provision of locker rooms, practice facilities, and competitive facilities.

    (h) Provision of medical and training facilities and services.

    (i) Provision of housing and dining facilities and services.

    (j) Publicity.

  (3) Although each factor appears to be of equal importance in the regulation, in practice the accommodation of athletic interests and abilities of the members of both sexes is analyzed separately from the remaining nine factors, which are generally considered together in determining whether there is equivalence in athletic benefits provided to members of both sexes.

B. Policy Interpretation and Letter of Clarification

1. In response to numerous questions about the applications of Title IX to athletic programs, the Department of Health, Education, and Welfare issued a Policy Interpretation in December 1979, which directly addressed the issue of compliance with Title IX in intercollegiate athletics. *Policy Interpretation: Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413 (December 11, 1979).

a. Although written specifically for intercollegiate athletic programs, the Policy Interpretation itself suggests that the general principles in the document will often apply to club, intramural, and interscholastic athletic programs which are also covered by Title IX and its regulations.

b. Courts considering Title IX challenges to high school level programs have consistently applied the Policy Interpretation and have afforded the agency's interpretation of the applicable regulations substantial deference. *See Williams v. School Dist. of Bethlehem*, 998 F.2d 168 (3d Cir. 1993); *Horner v. Kentucky High School Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994).

2. The Policy Interpretation sets forth three major areas of regulatory compliance:

a. Athletic Financial Assistance:

(1) 44 Fed. Reg. at 71,415.

(2) Compliance in the area of athletic financial assistance is measured by determining if the amount of financial assistance awarded to members of each sex is substantially proportionate to their respective rates of participation in athletic programs.

(a) An institution may be in compliance with Title IX even if there are disparities in proportionality when those disparities result from non-discriminatory factors.

(b) Although the regulations suggest that substantial proportionality between amount of assistance and rate of participation is the test, in *Gonyo v. Drake Univ.*, 879 F. Supp. 1000 (S.D. Iowa 1995), the court concluded that the over-allocation of financial assistance to female athletes did not violate Title IX.

b. Equivalence in Other Athletic Benefits and Opportunities:

(1) 44 Fed. Reg. at 71,415-17.

(2) Equivalence in the treatment of athletes of both sexes is the standard for judging compliance in the area of athletic benefits and opportunities.

(a) Identical treatment is not required if the overall effect of the differences is negligible or if the differences result from non-discriminatory factors.

(b) The unique aspects of particular sports such as the nature of equipment required for the sport (*i.e.*, football) or the nature of the facilities required for competition, may be non-discriminatory factors which can be considered; however, the school must be certain that it meets the sport specific needs for members of both sexes.

(c) Expenditures which are required because of anticipated crowds may also be a non-discriminatory factor, so long as even management support is available to both men's and women's teams and is based on sex neutral criteria.

(d) Differential treatment, however, cannot be justified based on differences in the amount of revenue generated by a sport relative to other sports.

(3) Compliance is determined by examining the athletic program as a whole.

(a) Differences afforded to members of one sex in a particular sport may be offset by differences afforded to members of the other sex in another sport.

(b) In determining if equivalence exists, the last nine items listed in the regulation are examined to determine the availability, quality, and kinds of benefits, opportunities, and treatment which are afforded to members of each sex.

c. Effective Accommodation of Student Interests and Abilities:

(1) 44 Fed. Reg. at 71, 417-18.

(2) Although OCR indicates that it will consider accommodation of student interests and abilities in conjunction with the preceding factors in determining compliance with Title IX in the program as a whole, recent litigation in the Title IX arena has focused heavily on the element of accommodation.

(a) In this area, OCR indicates it will consider how a school determines the athletic interests and abilities of its students, the selection of sports offered, and the levels of competition available in determining if the institution is fully and effectively accommodating student interests and abilities.

(3) Title IX does not require that a school integrate all of its athletic teams, nor does it require that exactly the same choice of sports be available for men and women.

(a) A school may be required either to permit the excluded sex to try out for an existing single-sex team or to sponsor a team for the previously excluded sex.

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(a) A school may be required either to permit the excluded sex to try out for an existing single-sex team or to sponsor a team for the previously excluded sex.

(b) If the sport is a contact sport, a separate team must be provided if :

(1) the opportunities for members of the excluded sex have been historically limited;

(2) there is sufficient interest and ability among students of the excluded sex to sustain a viable team; and

(3) there is a reasonable expectation of competition for the team.

(c) If the sport is a non-contract sport, in addition to those factors, there must also be a finding that members of the excluded sex do not possess sufficient skill to be selected for or compete actively on a single integrated team.

(4) A majority of courts have concluded the inquiry as to whether opportunities for members of the excluded sex have been historically limited is focused on overall athletic opportunities, not limited to opportunities in a particular sport.

(a) The mere opportunity to try out for a team previously limited to members of one sex is not determinative of the question of whether opportunities have been previously limited under Title IX.
(b) Athletic opportunities must be real opportunities to participate and play on the team, not illusory ones.

(5) Compliance in the area of levels of competition is assessed in one of three ways:

(a) by determining if participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.

(b) if the institution cannot show substantial proportionality, by determining if the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the interests and abilities of members of the under-represented sex.

(c) if the institution cannot show substantial proportionality or a history and continuing practice of program expansion, by demonstrating that the interests and abilities of members of the under represented sex have been fully and effectively accommodated by the present program.

(6) An institution is deemed to be in compliance with this test if it can meet any of the three prongs of the test.

II. BURDEN OF PROOF

A. In any case alleging a violation of Title IX, the ultimate burden lies with the plaintiffs to show that they have been excluded from participation in, or denied the benefits of, an athletic program on the basis of sex.

B. Proof of discriminatory intent is not required; disparate impact is sufficient to establish discrimination under Title IX.

C. In cases alleging a failure to fully and effectively accommodate the abilities and interests of students, the majority of courts have adopted the burden allocation first enunciated by the First Circuit in *Cohen v. Brown Univ.*

   1. Under the *Cohen* analysis, the plaintiffs must initially show a lack of substantial proportionality in the enrollment and athletic participation rates.

      a. The substantial proportionality prong of the test (often referred to as the "safe harbor") suggests compliance is achieved if the participation opportunities for male and female athletes are provided in numbers substantially proportionate to their respective enrollments.

         ☞ In other words, if 55% of an institution's students are female and 45% male, approximately 55% of the athletic participation opportunities should be for females; 45% for males. Because the measure is for participation opportunities, athletes who participate in more than one sport must be counted for each sport. Further, only actual participants, not potential participation slots, may be counted. However, those who practice with the team or are on the team roster generally may be counted even if they do not play in competition.

      b. The question of substantial proportionality has been addressed by the courts in several cases, most frequently resulting in findings of non-compliance.

         (1) In *Roberts v. Colorado State Univ.*, 814 F. Supp. 1507, *aff'd*, 998 F.2d 824 (10th Cir. 1993), the court found that a 10.5% disparity was not substantially proportionate, relying in part on earlier OCR findings that disparities of 7.5%, 12.5%, and 12.7% for the three it reviewed did not show substantial proportionality.

         (2) In *Cohen v. Brown Univ.*, 991 F.2d 888 (3d Cir. 1993), and *Favia v. Indiana Univ. of Pennsylvania*, 7 F.3d 332 (3d Cir. 1993), the courts concluded that disparities of 11.6% and 19% were insufficient to show substantial proportionality.

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c. From the case law and the OCR guidance, it is clear that an institution need not spend ever-increasing resources on athletic programs to achieve substantial proportionality.

(1) Financially strapped institutions may comply with Title IX by cutting athletic programs so that men's and women's participation rates in athletics become substantially proportionate to their respective enrollments; however, unless the cuts result in certain compliance with substantial proportionality, including women's programs in the cuts will be risky.

d. OCR has not drawn a bright line percentage for establishing substantial proportionality.

(1) OCR has suggested that numbers will be deemed substantially proportionate when the additional number of opportunities needed to achieve proportionality would not be sufficient to sustain a viable team.

2. If plaintiffs prove disparity, the school must then show that it has a history and continuing practice of program expansion responsive to the developing interests and abilities of members of the under represented sex.

a. A history of program expansion may include evidence of adding or upgrading of particular sports, of increasing the number of participants on particular teams, or of responding to requests from members of the under represented sex in these areas.

b. Additions at fixed intervals are not required; the focus is on whether the expansion is demonstrably responsive to developing interests.

c. The courts have universally refused to find the dramatic expansion of opportunities for women that occurred in the 1970's sufficient to meet Title IX requirements.

(1) Courts have emphasized the need for evidence of continuing efforts to develop women's programs, and responsiveness to the flux of unserved interests and abilities.

(2) In *Roberts*, the Tenth Circuit refused to read the words "continuing practice" out of this prong of the test, and concluded that the university did not meet its burden under this part of the test with proof of dramatic expansion of women's athletic opportunities during the 1970's. The court also found that participation opportunities for women had actually steadily declined during the 1980's.

d. In determining if expansion efforts are continuing, both the school's policies and procedures for requesting the addition of sports and the efforts of the school to monitor and be responsive to developing interests and abilities will be important.

   (1) Failure to communicate the policy to students or failure to take timely action in response to student assessments or surveys will be detrimental to the school's ability to show continuing efforts.

e. Unlike substantial proportionality, compliance with the second prong of the test cannot be achieved through cuts in athletic programs which may affect teams of both sexes.

   (1) The court in *Roberts* indicated that the ordinary meaning of the word "expansion" may not be twisted to find compliance under the history of continuing expansion prong when schools have increased the relative percentages of women participating in athletics by making cuts in both men's and women's sports programs.

   (2) Unless part of a comprehensive plan of expansion which has already begun, promises of future expansion also will not be sufficient to show compliance with the second prong of the test.

3. If the institution cannot show a history and continuing practice of program expansion, the burden then shifts back to the plaintiffs to show that the institution does not fully and effectively accommodate the interests and abilities of its women athletes.

   a. In this area, OCR will consider whether there is unmet interest in a particular sport, sufficient ability to sustain a team, and a reasonable expectation of competition in the league or geographical area in the sport if a team is created.

   b. If overall athletic opportunities for members of the under-represented sex have been historically limited, however, the school may have an affirmative obligation to encourage competition opportunities.

   c. Courts have rejected the argument that an institution need only accommodate women's interests to the extent it accommodates men's interests, noting that the regulation requires full accommodation of the abilities and interests of the under-represented sex.

      ☞ Meeting 85-90% of the interests of both males and females, and leaving 10-15% of female interests unmet will be insufficient; the *Cohen* court recognized that this is a high standard to meet.

d. There is generally no protection for male athletes using this test, because it applies only to the under-represented sex.

  (1) Unless males are the under-represented sex, it appears the failure of an athletic program to meet all of their abilities and interests will not result in a Title IX violation.

e. Suggested methods for determining interests include:

  (1) a survey or poll assessing interests and abilities of the student body,

  (2) a review of intramural and club programs,

  (3) a review of sports programs at "feeder schools,"

  (4) a review of community recreation and regional sports programs,

  (5) a review of sports being played in physical education classes.

f. Courts have relied on a variety of evidence to show institutional failure to fully and effectively accommodate interests and abilities.

  (1) In situations where a competitive women's team has been eliminated or demoted, the mere existence of the team appears to be sufficient to show unmet needs and unaccommodated interests.

g. When plaintiffs are seeking to have a new team created, the type of evidence necessary to show unmet need is less clear.

  (1) One court considered the following evidence relevant:

    (a) the fervor and persistence of club members who petitioned four times for elevation from club to varsity status,

    (b) the fact that 30-40 women participated in the club each year,

    (c) the fact that ice hockey was a sport played in prep schools in the area,

    (d) the fact that the club had played varsity teams as part of its schedule,

    (e) testimony from a coach from another program that the team would evolve into a competitive team over time with proper resources.

  (2) The court rejected the testimony of the college's own coaches who testified that the women could not compete at the varsity level, but admitted that they had never watched the women play.

III. PENALTIES

A. Loss of Federal Funds

B. Injunctive Relief

1. A court may issue an order directing the school to take some action or to cease some illegal action. Courts have, through injunctions, required schools to equalize funding, reinstate teams that had been cut, create teams, or allow participation on opposite sex teams.

2. For example, in *Horner vs. Kentucky High School Athletic Association*, the court ruled that the state association governing high school athletics could be made to sanction girls' fast pitch softball. 43 F.2d 265.

C. Monetary Damages and Attorneys' Fees

1. Plaintiffs in a successful Title IX suit may receive money damages and attorneys' fees as part of their relief. Awards of attorneys' fees in significant Title IX cases have been as high as $700,000.

2. In *Franklin vs. Gwinnett County Public Schools*, 112 S.Ct. 1028 (1992), the Supreme Court stated that all appropriate remedies, including monetary damages, are available under federal laws such as Title IX, absent congressional intent to the contrary. The court further ruled that compensatory damages are an available remedy for actions brought to enforce Title IX.

IV. CASE LAW UNDER TITLE IX

A. *Horner v. Kentucky High School Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994)

Involved a challenge to the methods used by the Kentucky High School Athletic Association for sanctioning sports. Specifically, twelve female student athletes alleged that the KHSAA and the Kentucky State Board of Education discriminated against them on the basis of sex, in violation of their rights under Title IX and the Equal Protection Clause of the Constitution, by sanctioning fewer sports for girls than for boys and by refusing to sanction fast-pitch softball.

Initially, the court concluded that since the functions of the KHSAA are statutorily decreed to be those of the Kentucky State Board of Education, a recipient of federal funds, KHSAA was also a recipient of federal funds within the meaning and intent of Title IX. The court, looking to the Policy Interpretation's test for accommodation, next concluded genuine issues of material fact precluded the granting of summary judgment in the case.

B. *Alston v. Virginia High School League, Inc.*, 176 F.R.D. 220 (W.D. Va. 1997)

Female high school students brought suit under Title IX and other statutes claiming denial of equal treatment of females. The court concluded that the plaintiffs had stated a claim against the League under Title IX because differences in scheduling boys and girls athletic seasons deprived girls of the chance to play all the sports of their choice. The plaintiffs argued that scheduling athletic seasons by first aligning high schools based on size contributed to sex discrimination against certain female athletes. Boys' sports were uniformly scheduled for the same season regardless of the size but certain girls' sports were to be played in different seasons depending on size of the school. The plaintiff's claimed that the female athletes who play more than one sport sacrifice participation opportunities because certain sports were played in the same season. The plaintiffs contended that they suffered from lost opportunities to play all sports of preference, reduced opportunities to obtain college athletic scholarships, and emotional distress from unequal treatment.

C. *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993)

Members of the women's gymnastics and volleyball teams obtained a preliminary injunction to stop the university from demoting their teams from full varsity to intercollegiate club status. The action, alleging a violation of Title IX, was brought as a class action after the university, as a belt-tightening measure in a time of financial difficulties, announced it would demote these two sports, along with men's golf and water polo.

D. *Cook v. Colgate Univ.*, 802 F. Supp. 737, *vacated and remanded*, 992 F.2d 17 (2d Cir. 1993)

The district court, concluding that the university had violated Title IX, ordered it to grant varsity status to the women's hockey club. On appeal, the Second Circuit avoided the merits of the action by finding the action rendered moot by the end of the hockey season and the graduation of the last students bringing the action.

E. *Favia v. Indiana Univ. of Pennsylvania*, 7 F.3d 332 (3d Cir. 1993).

After the plaintiffs obtained a preliminary injunction ordering reinstatement of the two women's sports, the university sought modification of the injunction to allow it to replace women's gymnastics with women's soccer. The district court's denial of the motion to modify was affirmed by the Third Circuit Court of Appeals, even though the evidence showed the addition of soccer would be less expensive and involve the participation of more women athletes.

F. *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824 (10th Cir. 1993).

Concluding that the university was not fully and effectively accommodating the abilities and interests of female athletes, the district court granted a permanent injunction ordering reinstatement of the team. The Tenth Circuit Court of Appeals affirmed.

G. *Kelly v. Board of Trustees of Univ. of Ill.*, 35 F.3d 265 (7th Cir. 1994)

The court concluded that the university's decision to terminate the men's swimming program while retaining the women's swimming program did not violate either Title IX or the Equal Protection Clause of the Fourteenth Amendment.

H. *Gonyo v. Drake Univ.*, 879 F. Supp. 1000 (S.D. Iowa 1995)

The district court failed to find a Title IX violation when the university eliminated its men's wrestling program.

I. *Kleczek v. Rhode Island Interscholastic League*, 768 F. Supp. 951 (D. R.I. 1991)

The court found no Title IX violation when a boy was denied permission to play on the girls' field hockey team.

J. *Williams v. School Dist. of Bethlehem*, 998 F.2d 168 (3d Cir. 1993)

The Third Circuit reversed the grant of summary judgment for the plaintiff, concluding genuine issues of material fact were still in dispute.

V. EMPLOYMENT ISSUES

A. Discrimination in Employment Prohibited

1. 34 C.F.R. § 106.51(a) states:

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

   a. Education, experience, and length of service with educational institution are legitimate, non-gender based reasons for pay differentials between male and female coaches. *Harker v. Utica College of Syracuse Univ.*, 885 F. Supp. 378 (N.D. N.Y. 1995).

2. Office of Civil Rights is charged with the administrative enforcement of Title IX. Section 106.71 adopts and incorporates the procedural provisions applicable to Title VI of the Civil Rights Act of 1964 as applying to Title IX. Those provisions are found at 34 C.F.R. §§ 100.6-100.11 and 34 C.F.R., Part 101.

   a. The following are the various means by which OCR enforces the provisions of Title IX:

(1) Compliance reviews and Complaints

(a) Periodically, OCR will select a number of recipients and conduct investigations to determine whether they are complying with Title IX. Likewise, OCR will investigate all written and timely complaints alleging discrimination on the basis of sex.

(b) If OCR determines that a recipient is in noncompliance, it will outline the violations found and negotiate with the recipient to come up with a "voluntary compliance agreement."

(c) The voluntary compliance agreement must describe:

(1) The manner in which institutional resources will be used to correct the violation and

(2) The acceptable time tables for reaching interim goals and full compliance.

(d) OCR will then periodically review the implementation of the agreement.

(2) Loss of funding

(a) If a recipient is found to be in noncompliance and voluntary compliance attempts are unsuccessful, the formal process leading to termination of Federal assistance will begin. These procedures, which include an opportunity to be heard before an administrative law judge, are set forth in 34 C.F.R., Chapter 101.

B. Significant Lawsuits

1. Private cause of action for damages

a. *Bowers v. Baylor Univ.*, 862 F. Supp. 142 (W.D. Tex. 1994)

The former coach of the women's basketball team sued the university and individual administrators for retaliation and sex discrimination under Title IX after she was fired for allegedly complaining about the disparate allocation of resources in the men's and women's basketball programs, including the disparate terms and conditions of her own employment versus that of the men's basketball coach.

In denying the university's motion to dismiss, the court found that there was a private cause of action for damages for individual employees under Title IX.

In reaching this conclusion, the court relied on three Supreme Court cases: *Cannon v. University of Chicago*, 95 S.Ct. 2080 (1979) (holding that a student had an implied private cause of action under Title IX); *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028 (1992) (holding that Title IX authorized monetary damages as a remedy for intentional discrimination); and *North Haven Bd. of Educ. v. Bell*, 102 S.Ct. 1912 (1982) (holding that employees who directly participate in federal programs receiving federal money fall within the provisions of Title IX).

b. *Lakowski v. James*, 66 F.3d 751 (5th Cir. 1995), *cert. denied*, 117 S.Ct. 357 (1996)

In this case, the Fifth Circuit determined that Title VII preempts any private right of action for employment discrimination under Title IX, since Title VII provides a specific administrative scheme for resolving such complaints.

Other courts have reached similar conclusions. *See Cooper v. Gustavus Adolphus College*, 957 F. Supp. 191 (D. Minn. 1997); *Wedding v. Univ. of Toledo*, 862 F. Supp. 201 (N.D. Ohio 1994).

But see Henschke v. New York Hospital, 821 F. Supp. 166 (S.D. N.Y. 1993) (holding that a private right of action for employment discrimination exists under Title IX separate and apart from Title VII and without regard to the availability of the Title VII remedy) and *Bedard v. Roger Williams Univ.*, 989 F. Supp. 94 (D. R.I. 1997); *Bartges v. Univ. of North Carolina*, 908 F. Supp. 1312 (W.D. N.C. 1995), *aff'd*, 94 F.3d 641 (4th Cir. 1996); and *Harker v. Utica College of Syracuse Univ.*, 885 F. Supp. 378 (N.D. N.Y. 1995) (all holding that there is a private cause of action for employment discrimination under Title IX and that such claims should be analyzed by analogy to Title VII).

c. *Lowrey v. Texas A & M Univ. System*, 117 F.3d 242 (5th Cir. 1997)

The women's basketball coach sued the university for sex discrimination and retaliation under Title IX after she was denied a promotion and removed from her position as women's athletic coordinator, allegedly as a result of her complaints regarding the misallocation of resources among male and female athletes.

The district court dismissed her complaint in its entirety, relying on the holding in *Lakowski*. However, the Fifth Circuit partially reversed the district court, on the ground that her retaliation claim, which arose from her complaints regarding the university's violations of Title IX, were unique to that statute and were not covered by Title VII.

The court was quick to point out that its holding was not a retreat from *Lakowski*, and that had the plaintiff's retaliation claim arisen from complaints about her employment, as opposed to complaints about the illegal misallocation of funds in violation of Title IX, it would have been preempted by Title VII. Under this reasoning, the appellate court did uphold the district court's decision to dismiss her sex discrimination claim.

But see Clay v. Board of Trustees, 905 F. Supp. 1488 (D. Kan. 1995) (holding that Title IX authorized a private cause of action for retaliation and stating that Title IX also authorized a private cause of action for employment discrimination generally, without the need to exhaust the administrative remedies of Title VII).

2. No private cause of action against individual employees

Federal courts have held that Title IX does not provide a private cause of action against individual defendants. *See Bowers v. Baylor Univ.*, 862 F. Supp. 142 (W.D. Tex. 1994); *Clay v. Board of Trustees*, 905 F. Supp. 1488 (D. Kan. 1995).

COMPLIANCE CHECKLIST

TRUE	FALSE	The percentage of female athletes at our school district corresponds with the percentage of female students in the general student body.
TRUE	FALSE	Over the last ten to fifteen years, our girls' athletics program has expanded with more teams being added for girls.
TRUE	FALSE	There are no females who play sports other than those already included in the varsity sports program who would be interested in having their sport offered as a varsity sport.
TRUE	FALSE	Cheerleaders, pep squads, and/or bands are provided for both girls' and boys' athletic events.
TRUE	FALSE	Both females and males get a chance to play in "prime" time evening slots when their working parents can come to see them play.
TRUE	FALSE	The quality of equipment and uniforms provided to our male and female athletes is identical.
TRUE	FALSE	Locker rooms for male and female athletes are the same size and contain the same amenities.
TRUE	FALSE	Practice and game facilities for male and female athletes are of the same quality.
TRUE	FALSE	The quality (salaries paid/teaching load) and number of coaches (coach/athlete teaching ratio) provided to male and female athletes are comparable.
TRUE	FALSE	Our institution makes the same effort to promote (*i.e.*, schedule cards, posters, press releases, ticket sales efforts, etc.) girls' sports as it does boys' sports.
TRUE	FALSE	The weight training facility used by female athletes is as well equipped as the weight training facility used by male athletes or they both have access to the same facility and comparable work-out times.
TRUE	FALSE	When asked why female athletes are treated differently than male athletes, our athletic director or principal never give the following answers:

- Male athletes get more because football earns money.
- Male athletes get more because their booster club pays for it.
- Girls aren't as interested in sports as boys are.
- There isn't enough money to start a new sport for the girls.

The Implementation of Title IX Athletic Policy: Expansion of the Mandate

by Robert R. Hunt
44th Annual Education Law Association Convention

1. Title IX

a. Prohibits discrimination on the basis of sex in federally assisted educational programs and activities.

2. Expansions of the Mandate:

a. Institutional coverage: extension of coverage to indirectly funded and non-funded such as athletics

b. Enforcement: threat of funding termination expanded to affect compliance on an institution-wide basis

c. Implied private right of action

d. Damages

e. Affirmative Action-like measures designed to equalize participation opportunities in intercollegiate competition

3. Theoretical Background

a. **Implementation Theory**:

  i. Old Paradigm: "Command-and-compliance"–high level officials (legislators and judges) can unilaterally create policy that is socially and politically realistic

    (1) alterations to legal objectives viewed as deviations

  ii. New Paradigm: many adjustments to policy occur in the implementation process due to the ambiguity of legislation, the lack of knowledge concerning social problems, and the effects of policy

    (1) the administration of programs, accordingly, is rarely a purely ministerial or "apolitical" process

    (2) program objectives may change and that some social good may still result

b. **Legal Theory**

i. The implementation of socio-legal mandates like Title IX, or the use of the law for "social engineering", means that the legal structures may frequently need to be adjusted following the conclusion of the legislative process as needs and inadequacies become more apparent

(1) courts and agencies are frequently called upon to weigh competing demands and consider the effects of policy (political functions) within the context of legal decisionmaking

(2) Because legal outcomes are not premised solely on the application of "neutral" legal principles, the public law of implementation may be is characterized as "politicized"

(3) implementation is properly viewed as an extension of the law-making process

4. Theory of the Study

a. Due to legislative imprecision and shortages of information about social problems and the effects of policy on those problems, many of the conflicts encountered during the formation of the of the mandate are exported to implementation

b. Discretion in implementation is highly decentralized and accessible by complaint, campaign and lawsuit to groups with interests and ideologies which conflict with those of the mandate

c. The conflicts encounter during formation are predictive of the issues which arise at different junctures in implementation and potential adjustments in objectives

d. Depending on their disposition towards the goals of the mandate, agencies and courts may be expected to be either hostile or responsive to important competing interests

5. Methodology

a. longitudinal policy analysis – examination of issues and events having a significant effect on Title IX policy and their relationship to the goals of the mandate and competing demands through,

i. Comparison of policy conflicts encountered during Title IX formation with the conflicts underlying adjustments occurring in implementation

ii. Examinations of the legal sufficiency of significant developments

6. Findings

a. Many changes in the Title IX framework generally, and athletic policy specifically can be understood as extensions of at least two disputes encountered during the formation of the mandate

   (1) Total vs. qualified equality (ie; whether to treat sex discrimination like race discrimination)

   (2) equality vs. institutional autonomy and academic freedoms.

b. Many interpretations of the mandate by DHEW, OCR and the courts characterized by:

   i. reliance on tenuous precedent and strained application of the cannons of statutory interpretation

   ii. Liberal application of title VI precedent (based on a different, and more expansive constitutional standard of review)

   iii. A responsiveness on the part of decisionmakers Title IX's broader social purposes evidenced by

      (1) a desire to treat sex like race discrimination by expanding the scope and remedial character of the mandate, e.g.;

         (a) the "Federal assistance" and "programs" and "activities" limitations expressed in the statute annulled to expand its influence,

         (b) private right of action and damages inferred over conflicting indications of congressional intent,

         (c) and "substantial proportionality" sustained as the first, and in most instances, last test of compliance, inspite of Title IX's explicit ban on the use of preferences and statistical balancing to remedy societal biases

Cohen v. Brown University and the Acceleration of Gender-Equity In Higher Education

by Robert R. Hunt[1]

Introduction

While somewhat unspectacular, the 1997 finale of the seemingly boundless litigation in *Cohen v. Brown University* (1997) has certainly given colleges and universities greater reason to reflect upon their efforts to scale an NCAA championship or to simply educate the "whole person" by encouraging participation in intercollegiate athletics. The series of decisions in that case, concluding with the Supreme Court's rejection of Brown's petition for certiorari, leaves us with at least the temporary sanction of Title IX athletic policy which virtually mandates that institutions maintain proportionately equal participation by men and women.

This conclusion, briefly, is premised on the assertion that the three-part analysis upheld in *Cohen* for determining whether an institution's athletic programs "effectively accommodate the interests and abilities" of men and women, can only be satisfied by achieving the statistical relationship between participation and enrollment ("substantial proportionality") which courts have acknowledged as a "safe harbor" from legal challenge (OCR Policy Interpretation, 1979). In most instances this means that prior to a specific finding of discrimination, in order to comply, institutions must extend greater opportunities to women through a procedure of preferential program expansion, while denying opportunities to a certain percentage of men.

This result is important in a couple of related respects. First, although the use of similarly "remedial" gender classifications has been sanctioned under constitutional equal protection analysis (e.g.; the use of separate men's and women's teams) they have normally been premised on specific findings that the institutions involved had in fact discriminated.[2] Following *Cohen*, by contrast, a deviation from the proportionality standard raises an inference of discrimination which an institution must rebut to avoid a determination of noncompliance, by demonstrating that it has either continuously expanded athletic programs for women, or has met the athletic interests of every woman (but not every man) on campus.

Second, because each of these alternative tests take proportionality as their logical end and therefore reinforce the necessity of statistical balancing, the entire effective accommodation analysis can be characterized as "an affirmative action, quota-based scheme" which dispenses with the question of accountability, or the causal connection between an institution's practices and the alleged discrimination (*Cohen IV*, 1996, dissent of C.J. Torruella). The import of these distinctions is that under the current formulation of Title IX requirements, institutions are shouldered with responsibility for the effects of historical, social, and cultural influences on female interest in athletic participation–factors largely beyond the control of colleges and universities and, arguably, an inappropriate basis for Title IX liability.

Title IX and its legislative history, in fact, explicitly discourage such an interpretation (*see* Hearings on Title IX Regulations, 1975, p. 555). Section 1681(b) of the statute, in particular, provides that:

> Nothing contained in ... this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity in comparison with the total number or percentage of persons of that sex in any community, state, section or other area. (20 U.S.C. §1681(b))

This provision, according to the legislative record, was inserted to prevent interpretations of the statute creating a Title IX "entitlement", or a guarantee of "equal result" rather than equal opportunity (Cong. Rec., 1972). By affirming the use of preferences to address statistical disparities in athletic participation which may reflect genuine differences in interest rather than discrimination, in short, *Cohen* can be viewed as an endorsement of much broader view of Title IX than the statute's terms and legislative history may warrant.

Admittedly, the forgoing description of *Cohen* and its implications involves many complex issues that are not only difficult to summarize, but challenge one's sense of propriety in matters of both law and public policy. For these reason and others, it is not my ambition to show that current approach is "wrong". Indeed, as a left-leaning observer of Title IX there is little about *Cohen* which I dislike; by staking-out a clear standard for Title IX compliance, institutions and the NCAA will be forced, after years of dilatory maneuvering and defiant neglect, to make difficult choices.

As a lawyer reared in the positivist tradition, on the other hand, I am somewhat uncomfortable with a regulatory framework which is perhaps most aptly described as "greater than the sum of its parts". The purpose of this paper, accordingly, is not to debunk *Cohen* but the belief widely held in higher education and legal circles alike that in the process of implementing social reforms like Title IX, "the law" operates as an irrevocable barrier between what I want and what reason tells me I can have. In support of this proposition, I will attempt to demonstrate that the current Title IX doctrine bears a closer resemblance to the broad policy ambitions of the women's movement prior to the statute's enactment than to their legal expression in the statute, and that the decisionmaking underlying this result has been at least as entrepreneurial as it has been dutiful to the mandate and its legislative history.

The conceptual framework selected for this undertaking (described below), focuses on the nature of the legal process of administering or implementing "socio-legal" mandates like Title IX and includes discussions of the pressures brought to bear on the legal system when it assumes responsibility for politically charged social initiatives, and when asked to resolve disputes involving significant issues of public policy.

Conceptual Framework

The implementation of public policy initiatives like Title IX is a topic which has received considerable attention in the last 25 years. Beginning with Pressman and Wildavsky's seminal study *Implementation: How Great Expectations in Washington are Dashed in Oakland* (1973), theory and research in this developing area has examined a host of variables, including resource, organizational and political requirements.

Currently, however, it is widely acknowledged that implementation simply involves too many variables to persist in the belief that lawmakers can unilaterally design policies that are either socially or politically realistic (Goggin, Bowman, Lester, & O'Toole, 1990). "The day is long gone," as Professor Yudof observed, "when lawyers and social scientists [can] assume that Court decisions and legislative and administrative rules automatically are translated into the desired action" (Yudof, 1981, p. 443).

While explanations of this breakdown between "command and compliance" abound, comparatively little has been said about the role of law and the legal system in the implementation equation. An exception is William Clune, a scholar of law and education who, in the early 1980's, recognized implementation as a process of "creating or attempting social change through law", and widely ruminated on the consequences of the use of law for "social engineering" (Clune, 1983, p. 51). In a system traditionally characterized by the rigorous observation of legal standards and process to structure decisions, Clune is interested in what occurs when that conventional legal rationality collides with politically-charged social interventions like Title IX.

Two related effects are discussed at length. The first is the inability of conventional rationality to adequately comprehend or resolve what are essentially public policy conflicts. The second involves the infusion of public policy discourse into the interpretation and enforcement of rights which, unlike those in the private sector, "depend dramatically on the state rather than freedom from the state" (Clune 1983, pp. 102-103). The legal system's responsibility for the maintenance of the modern "regulatory-welfare-state" where issues of law and public policy are often inextricable, Clune maintains, has precipitated a shift from a rigid "rule-orientation" to a more "reflexive rationality" emphasizing a greater responsiveness to input arising from the regulated context in order to effectuate the substantive social objectives of Congress (Clune, 1983, Teubner, 1983). Courts and bureaucrats, in other words, are seen more readily engaged in activities ordinarily regarded as the exclusive domain of the political branch of government such as evaluating competing social interests and the effects of policy (Clune, 1983; McDougall, 1989).

Precipitating this "politicization" of public law, Clune argues, are the shortcomings of the political process itself. To negotiate that process, for example, lawmakers resort to statutory language evading difficult, embedded issues. Compounding this imprecision is the type of uncertainty summarized in the axiomatic observation that whatever knowledge is available to legislators about the social problem they wish to address, or the effects of policy on the problem, is typically deficient. The result is the generation of socio-legal mandates (or laws transmitting social policy objectives) which, though momentarily satisfactory, are nevertheless unrealistic.

Because common implementation chores like the interpretation, application and enforcement of these directives provide a multitude of opportunities to alter the "political balance" (or the way in which competing demands were originally compromised by legislators), moreover, efforts may be mounted to either narrow or expand the law's sphere of influence. Arguments that some aspect of a program imposes an unreasonable hardship, for example, may materialize in the form of a lawsuit seeking to annul a regulation or guideline, and political channels may be manipulated to procure favorable treatment from an agency or to obtain an amendment.

These activities, naturally, tend to elicit similar reactions from those with conflicting interests

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and ideologies. For this reason the post-legislative process is described as "interactive" one, where "[a]ny given legal or political action may be met with a reaction by the organizations affected" (Clune 1983, p.56).

> Thus, a bill or a judicial decree introduced to enforce civil rights may be met with legislative initiatives designed to dilute or reinforce it. Regulations enacted under legislation may be met with political resistance and the regulations may be revoked. Enforcement measures such as threatened sanctions may be greeted with political backlash designed to produce a withdrawal of the threat, or with various organizational adaptations ... In a lawsuit, these efforts take the form of attempts to modify the decree or to obtain various remedial orders. In administrative practice, lobbying to strengthen or to weaken the underlying statute, administrative regulations, and practical administrative sanctions are common. (Clune 1983, p.56-57)

In a process bearing a resemblance to a military campaign, in other words, competing demands are constantly reasserted in the hope that the objectives reflected in statutes and regulations will be modified. "When policy does grow in an orderly fashion", Clune asserts, "it is because struggles were resolved at a multitude of critical junctures in a manner at least reasonably consistent with the underlying purpose of the law" (Clune, 1983, pp. 57-58).

At the heart of Clune's "political model of implementation", therefore, is the proposition that political struggles over policy goals do not necessarily expire with the legislative process, but are exported to implementation where discretion is considerably decentralized and where the decisionmaking process can often be set in motion by interested parties. This accessibility, it is asserted, operates as a virtual assurance that organizations will confront one another in "legalized sectors of public policy", and that the progression from specified policy goals to specified outcomes will rarely be logical or tranquil (Clune, 1983, p. 99). Rather, struggle, conflict and compromise among contending interest groups will ensure that policy goals and their associated "costs" are continuously revisited with the accompanying potential that the political balance of the program will be constantly revised (Clune 1983, p.53).

While campaigns aimed at limiting a statutes' effects are natural extensions of the political process (e.g.; the Tower Amendment, introduced in 1975 to exempt athletic programs from Title IX coverage), however, efforts to persuade non-elected officials or a decisionmaker's own bias towards the goals of the program pose unique challenges for the legal system. In those instances, politics (used here to refer to policy preferences, whatever their origin) tend to collide with the expectations that decisions will be structured around unassailable rules and standards, and that some record of that reasoning will be provided.

Clune's assertions about the nature of implementation and public law, to summarize, stand in marked contrast to more conventional theories and popular conceptions holding that implementation is (or should be) merely a "ministerial" process in which political determinations of policy are faithfully carried out, as well as jurisprudential theory holding that the law and the legal system are (or should be) insulated from social and political influence. While acknowledging that the rational application of legal rules continues to exert a great deal of influence on legal outcomes, he also believes that the real and perceived effect of substantive social reforms makes implementation an inescapably political undertaking.

In addition to this conceptual framework for understanding decisionmaking in implementation, Clune's model supplies a great deal of practical guidance for those interested in examining the modification of a program like Title IX. Because socio-legal mandates are described as "overture[s] to a complex process of compromise and adjustment," in particular, it is suggested that an understanding of that political compromise, in terms history and implicit policy conflicts, will assist the exploration of later modifications which are held to "proceed from the same source" (Clune, 1983, p.83, 59).

Initially therefore, the following discussion focuses on Title IX's history and structure. After an examination of several significant modifications of the program's legal structure and the issues which connect them, a few summary observations are made about Title IX implementation and its relationship to the legal system.

Title IX Formation

The overarching aim of the women's groups which coalesced in the early 1970's into the "second women's movement", observers seem to agree, was to reform federal policy regarding sex discrimination (Sachs & Wilson, 1979). Although a variety of motives have been implicated, there are many indications that the economic plight of women in the late 1960's and early 70's provided the impetus and direction for these efforts.[3] Salomone (1986), for example, observes that at that moment in history an educated generation of "baby boom" women entered the work force "only to face a world of limited employment opportunities and a persistent gap in earnings between the sexes" (p. 113).

To address those conditions, it is asserted, activists exploited the "full range of political tactics" at their disposal to secure protections similar to those afforded to racial and ethnic minorities. (Costain & Costain, 1992) Lawsuits were initiated to pressure the federal courts to elevate the level of protection afforded to women under constitutional equal protection analysis[4], and a political campaign was mounted to secure approval of the Equal Rights Amendment (ERA)[5], a constitutional measure designed to prohibit all but the most compelling gender classifications in laws and policies regulating among other things, marriage, guardianship, dependents, property ownership, independent business ownership, dower rights, and attendance at state universities. (Report of the Presidential Task Force on Women's Rights and Responsibilities, 1970)

The legislative effort from which Title IX emerged, in other words, was but one aspect of a three-part strategy to produce a "single, coherent theory of women's equality before the law", and the component which sought to build on the recent successes of the civil rights movement. (Brown et al., 1971, p. 883). As a complementary political objective advancing a rigorous "no-exceptions" policy, accordingly, the ERA provides the clearest expression of the policy goals which prompted Representative Edith Green in 1970 to introduce an amendment to Title VI of the Civil Rights Act (1964) to prohibit sex discrimination without exception, in all federally assisted programs. Although Title VII of the Civil Rights Act already provided some workplace protections to women, Title VI controls access to many of the more indirect means of economic productivity including education and job training.

The Title VI amendment, however, was opposed as being so broad as to engender an "undesirable" level of equality between the sexes since that statute governed many programs in which sex was informally regarded as a *bona fide* basis for differential treatment and further, would endanger such cherished traditions such as single-sex schools (House Hearing Report, 1970).[6] Green responded in 1971 by offering a independent provision limited to prohibiting sex discrimination in federally assisted *educational* programs and activities, with express exemptions for single-sex, military and religious institutions (House Hearing Report, 1970).

In slightly altered form, this provision proved to be the sole success of the movement's three-part strategy, but only distantly reflected the goal exhibited in the ERA of eradicating sex discrimination on the broadest possible scale. The basis of that shortcoming (as well as the failure of the ERA, and the continued resistance of the judiciary to elevating the level of protection under equal protection analysis), simply put, was an unwillingness on the part of lawmakers to treat sex discrimination like race discrimination.

Nowhere was this diffidence in greater evidence than in the effort to exempt college and university admissions policies from Title IX coverage (Cong Rec., 1971). In that debate, republican lawmakers in the House of Representatives asserted that the imposition of federal control over admissions would "plant the seed of destruction for our system of higher education as we know it" (Cong. Rec., 1971, p. 39,249).

> Enactment of Title [IX] would [] significantly weaken one of the great strengths of the American system of higher education–diversity. Diversity in the types of educational institutions affords more freedom to students, allowing each the opportunity to select the type of educational environment best suited to their individual needs, and encourages colleges to experiment and develop innovative programs. *The imposition of a monolithic unity by federal statute would serve only to homogenize campuses*, a condition repugnant to the very nature of higher education in this country and contrary to the best interests of the future generations of college students (Cong. Rec., 1971, p. 39,249, remarks of Rep. Erlenborn, emphasis added).

Although the proposed legislation sought only to eliminate the consideration of an applicant's sex in the admissions process rather than require institutions to equalize numbers of male and female students, the rhetoric was proportionately enlarged to highlight where that minute erosion of institutional autonomy and academic freedom might lead.

> Mr. Chairman, I offer this amendment to preserve the swiftly eroding rights of colleges and universities of America. We must view Title [IX] for what it plainly is, just one more giant step toward involvement by the Federal Government in the internal affairs of institutions of higher education. The constant danger is that all too often federal involvement in the internal affairs of institutions is but the first step toward ultimate Federal control (Cong. Rec., 1971; 39,248).

Without the prompting of a significant change in constitutional law (e.g., ratification of the ERA), in short, congressional opponents of Title IX saw little reason to abandon their tradition of not interfering in college and university affairs, or to marginalize the academic freedoms acknowledged by the Supreme Court in *Sweezy v. New Hampshire* (1957) to include the "ability of the institution to determine for itself, on academic grounds ... *who may be admitted*."

Among the rejoinders to those arguments was the assertion that federal intervention in higher education for the purpose of preventing discrimination was not an issue of "first impression"; that Congress had enacted Title VI of the Civil Rights Act nearly a decade earlier to prohibit colleges and universities from discriminating on the basis of race or nationality (Cong. Rec., 1971, p. 39,252). That reminder, however, failed to deter a majority of lawmakers from acting upon their conviction that, unlike race discrimination, sex discrimination is not an absolute evil; that in certain circumstances the ability to differentiate treatment on the basis of sex satisfied the needs of society and its institutions.[7]

Developments in Athletic Policy

Title IX Coverage

> "No person in the United States shall, on the basis of sex, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance" (P. L. 92-318 codified at 20 U.S.C. §1681 et seq.,)

As with most statutory directives, the transition from the spare language of Title IX to a set of comprehensive regulations dealing with a variety of educational programs and activities involved a great deal of interpretation, a task which Congress delegated to the Department of Health, Education and Welfare (DHEW). The publication of DHEW's draft regulations revealed that in the absence of more explicit direction from Congress, and a shortage of case law dealing with sex discrimination in education, it had taken the liberty to give the statute a very broad interpretation, substantially expanding its coverage and the agency's powers of enforcement.

In a move which astonished many observers, for example, DHEW abrogated perhaps the most significant of Title IX's limitations; extending coverage from programs "receiving federal financial assistance" to those presumed by institutional proximity to indirectly benefit from that assistance, and by defining "assistance" to include the indirect receipt of federal student financial aid (Fed. Reg., 1974). By extending coverage to virtually every aspect of an institution's operations in this manner, the agency transformed the standard of Title IX jurisdiction from a narrow "program-specific" standard into much broader "institutional" standard.[8]

Importantly, however, that modification of policy was not only grounded on the slimmest of precedents but involved a studious disregard of contradictory evidence and authority (BYU L. R., 1976, Kuhn, 1976).[9] In support of its "benefit theory" of coverage, for example, DHEW relied exclusively on *Board of Public Instruction of v. Finch* (1969), a case arising under Title VI in which the Fifth Circuit remarked in dicta that virtually all programs within an institution benefit from federal assistance insofar as the introduction of federal monies "releases" institutional funds for other uses. What the agency overlooked or failed to mention, however, was that the court went on to hold that DHEW could not seek to affect compliance by terminating funds without first demonstrating that the program in direct receipt of those funds was itself discriminatory (*Finch*, 1969). Absent the power to enforce compliance in "benefitting" programs, logically, an extension of coverage to those programs would be meaningless.

Once exposed to searching legal scrutiny, accordingly, DHEW's house of cards quickly folded. In *North Haven Board of Education v. Bell* (1982) and *Grove City College v. Bell* (1984) specifically, the Supreme Court invalidated DHEW's benefit theory and returned Title IX coverage to the program-specific standard suggested by a more literal reading of the statute. Because the agency had exported its institutional interpretation of coverage to several other equity programs in the intervening decade, however, *Grove City* had much broader implications. For this reason, activists from wide array of civil rights organizations were able to band together to persuade Congress to overrule *Grove City* by amending the definition of "program or activity" in each of those statutes to include institutions (Civil Rights Restoration Act, 1987).

Regulation of Athletic Programs

With the exception of the four-year period following *Grove City*, DHEW's definition of Title IX coverage has had profound consequences for athletic programs which critics have regularly asserted neither receive direct federal assistance nor are "educational" within the meaning of the statute (Hearings on Title IX Regulations, 1975 p.520). Guided by its institutional theory of coverage, however, the agency naturally regarded extracurricular programs including athletics as falling within Title IX coverage and took the additional step of promulgating specific regulations (Fed. Reg., 1974).

The regulation of athletic programs, however, provoked a vigorous response in Congress. Amendments, like the one sponsored by Senator John Tower, for example, were introduced to exempt athletic programs either in whole or part; the fear being that a mandated expansion of women's programs would divert resources from more visible and lucrative men's programs (Cong. Rec., 1975, p. 22,778). The measure finally approved, the "Javits Amendment," (1974) directed DHEW to make "reasonable provisions considering the nature of particular sports"–a half-hearted attempt to exempt "revenue-producing" sports programs which unwittingly succeeded in shoring-up DHEW's basis for extending coverage to athletic programs in the first place. Congress, DHEW Secretary Caspar Weinberger reasoned, would not have imposed a "reasonableness" standard unless it considered athletic programs to be covered by the statute (Hearings on Title IX Regulations, 1975, p. 438).

Intercollegiate athletic programs, however, differ from other educational programs in ways which make them difficult targets of gender-based reform, including dangerous bodily contact in certain sports and an expectation of economic self-sufficiency at the departmental level.[10] For this reason, perhaps, DHEW's proposed regulations sought to simply equalize participation by requiring institutions to undertake "affirmative efforts" in the form of additional training, support, and publicity to enable women to participate in greater numbers, and to then provide "athletic opportunities in such sports and through such teams as will most effectively equalize opportunities for members of both sexes ..." (Fed. Reg., 1974, p. 22,230).

While "ease of administration" certainly recommends such an approach, requiring institutions to develop female interest in athletic participation also subtly shifts accountability from factors within the control of institutions (i.e.; number and level of programs) to social factors largely beyond their control. From the 9700 comments, suggestions, and objections elicited by these proposed requirements, accordingly, a decisive criticism emerged; by requiring institutions to take steps to increase female participation *prior* to any finding of discrimination by the institution, the requirements confused the concepts of "equal opportunity" and "affirmative action".

Ultimately those criticisms and the clarity of the statute's injunction against the use of preferential treatment to correct statistical imbalances (§1681(b)) forced DHEW to not only withdraw the requirements, but admit that they were inconsistent with the mandate. The agency's "final regulations" (1975), moreover, assess "equal opportunity" in athletic programming by reference to the accommodation of *existing* student interest, whether or not the results are statistically equivalent (Fed. Reg., 1975).

Of equal or greater importance, however, is the fact that under the regulations the accommodation inquiry is relegated to the status of one of a host of factors referred to by DHEW in a determination of compliance. In assessing compliance, specifically, the regulations state that the agency will consider "among other factors":

> (a) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of the members of both sexes (b) the provision of equipment and supplies; (c) scheduling of games and practice times; (d) travel and per diem expenses; (e) opportunity to receive coaching and academic tutoring; (f) assignment and compensation of coaches and tutors; (g) provision of locker rooms, practice and competitive facilities; (h) provision of medical and training facilities and services; (i) provision of housing and dining facilities and services; and (j) publicity (Fed. Reg., 1975, p. 24,134).

An important consequence of assessing compliance by means other than exclusive reference to the accommodation of student interest, is that institutions retain control over many aspects of programming which effect not just students, but the interests of the institution in maintaining athletic programs such as visibility and prestige.[11]

Following Congress' reluctant approval of the regulations[12], 1978 and 1979 produced major developments in enforcement policy of which the same Congress would almost certainly have disapproved. The first, the Policy Interpretation of Title IX and Intercollegiate Athletics ("Policy Interpretation,"1979) issued by the Department of Education's Office for Civil Right ("OCR" assumed responsibility for Title IX following the dissolution of DHEW) to clarify the regulations, renewed the emphasis on equalizing participation (Fed. Reg., 1979).

In that document OCR separates the ten equal opportunity factors specified in the regulations into three "major areas" or tests of compliance: equitable distribution of athletic scholarships, "equivalence in other athletic benefits and opportunities" (e.g., travel and equipment), and "effective accommodation of student interests and abilities" (Fed. Reg., 1979, pp. 71,415-417). The relevance of this change is readily apparent: effective accommodation is elevated from a one-in-ten consideration under the regulations, to a one-in-three consideration. Further, because the agency failed to clarify whether the tests must be applied together for the purposes of establishing compliance or may be applied independently, effective accommodation can be understood as a "complete compliance section on its own" (Shook, 1996, p. 797; see also *Cohen II*, 1993).

The "three-pronged" method chosen by OCR to effectuate the effective accommodation standard requires institutions to alternatively demonstrate that the rate of female participation in athletic programs is approximately proportionate to their rate of undergraduate enrollment, that they have a history and maintained a "continuing practice" of program development for women, or by producing evidence that the existing program "fully and effectively" accommodates the interests and abilities of both sexes (Fed. Reg., 1979). In most instances, OCR stated, meeting the effective accommodation requirement "will entail development of athletic programs that substantially expand opportunities for women to participate and compete at all levels," a result which it attempted to justify by reference to "the discriminatory effects of the historic emphasis on men's intercollegiate sports," and the "nationally increasing levels of women's interests and abilities " (Fed. Reg., 1979, p. 74,414-419).[13]

The second event alluded to earlier involved a ruling of the Supreme Court making athletic programs much more vulnerable to challenge. In *Cannon v. University of Chicago* (1979) the Court enabled individuals with complaints arising under Title IX to circumvent time-consuming administrative procedures by implying a private right of action--a move which precipitated a flood of new litigation and essentially gave the courts primary responsibility for Title IX enforcement.

Utilizing a four-part analysis developed four years earlier in *Cort v. Ash* (1975), the Court determined that the purposes of Title IX, the legal context in which it was enacted, and the inadequacy of the statute's funding termination remedy for redressing individual harm, all suggested that in spite of its silence on the issue, Congress had contemplated enforcement by private litigants. Justice Stevens, who authored the majority opinion, was particularly attentive to the fact that "in 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy" in (*Cannon*, 1979, pp. 697-698).[14] "It is always appropriate," he reasoned in imputing an awareness of those developments to the Congress "to assume that our elected representatives, like other citizens, know the law ..." (*Cannon*, 1979, pp. 697-98).

Equally persuasive in the Court's view, was the onerous burden of proof imposed on individuals to trigger the statutory remedy. "[I]t makes little sense", the Court reasoned, "to impose on an individual, whose only interest is in obtaining a benefit for herself ... the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cutoff of federal funding is appropriate" (*Cannon*, 1979, p. 705). In such situations, it was asserted, violations would be more efficiently remedied by a court ordered injunction, "requiring an institution to accept an applicant who had been improperly excluded" (*Cannon*, 1979, p. 705).

In light of the Court's foray into issues of public policy perhaps, in his dissenting opinion Justice Powell chastened the majority for succumbing to the "temptation to lend its assistance to the furtherance of [a] remedial end deemed attractive" (*Cannon*, 1979, p. 749). Powell, however, was particularly critical the practice of implying private rights of action which, by allowing the courts to expand their own jurisdiction, he viewed as a disturbing violation of the constitutional separation of powers. "When Congress chooses not to provide a private civil remedy," he asserted, "Federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction" (*Cannon*, 1979, pp. 731-732).[15] In this instance, he continued, Title IX's legislative history made it clear that "Congress deemed the administrative enforcement mechanism it did create fully adequate to protect Title IX rights" (*Cannon*, 1979, p. 730).

The installation of the federal courts as the principle arbiters of Title IX, importantly, has tremendously accelerated the rate of policy development under the statute. A leading example is the Court's decision in *Franklin v. Gwinnett County* (1992), validating the use of compensatory damages to remedy individual harm arising from a Title IX violation.[16] Judicial cognizance of the athletic regulations, moreover, has rapidly evolved and solidified the details of those requirements (Heckman, 1994, p. 963).[17] The four cases now regarded as the "jewels" of Title IX athletic case law (*Cook v. Colgate University* [1993], *Cohen v. Brown University* [1992], *Favia v. Indiana University of Pennsylvania* [1992], and *Roberts v. Colorado State University* [1992]), for example, can be traced directly to the Court's liberalization of Title IX enforcement.

As there was scant case law construing the athletic regulations, in all but one of the cases noted above (*Cook*) the courts accorded considerable weight to OCR's Policy Interpretation and the agency's unpublished Investigator's Manual (1990). While these documents provided some clarification of the regulations' requirements, however, the experience of these courts shows that they raised as many questions as they answered.

Does, for example, the renewed emphasis on equalizing participation as opposed to ensuring equal access, comport with the goals of statute? Or more specifically, does a test in which compliance is assessed by reference to statistical proportionality or demonstrated progress towards that goal, conform Title IX's ban on preferential treatment and constitutional guarantees? In each case, deferring to OCR's interpretive authority, the courts have answered these questions in the affirmative and clarified other issues of practical importance[18], including whether the effective accommodation analysis is "severable" from the other major compliance areas for the purposes of concluding a Title IX violation (Heckman, 1994).

Of the cases construing OCR's three-pronged "effective accommodation" analysis, the most illustrative[19], exhaustive[20], and dispositive involved a class-action suit brought by female members of Brown University's volleyball and gymnastics teams after those programs, along with two men's teams, were demoted for budgetary reasons from varsity to club status in May of 1991.

In the course of upholding OCR's effective accommodation analysis, the *Cohen* courts (there were four) developed Title IX athletic policy by clarifying the three elements of the analysis, by deciding that the analysis itself is severable from the two other major compliance areas for the purposes of establishing a violation of Title IX, and by unraveling an important challenge to the analysis. One striking aspect of these accomplishments was the level of deference accorded by the courts to OCR's interpretation of the regulations. In dismissing Brown's contention that the Policy Interpretation "goes so far afield that it countervails the enabling legislation," for example, the appellate court held that it was a "plausible" interpretation of the regulation and noted that when the Civil Rights Restoration Act (1987) was enacted, Congress had the opportunity to disapprove of the Policy Interpretation and "chose instead to reaffirm its intent that Title IX's prohibition against sex discrimination be broadly construed" (*Cohen III*, 1995, p. 198).[21]

The question of severability, or whether a failing in any one of the Policy Interpretation's three major areas of compliance may constitute a Title IX violation, as the district court noted, was a decisive consideration because the claim against Brown was based solely on an alleged violation of the effective accommodation component of the Policy Interpretation (*Cohen I*, 1992).

In opposition to that finding, the University advanced the argument that the Policy Interpretation and the Investigator's Manual contain a "complex framework for assessing athletic programs as a whole" and that many more questions and factors would have to be addressed before proving a Title IX violation (*Cohen I*, 1992, p. 987).[22]

Finding both documents inconclusive and pointing to conflicting language in the Investigator's Manual providing in effect that investigations may be limited to less than all three of the major compliance areas, the courts ruled that because participation controls access to all other benefits of athletic programs the effective accommodation analysis could be severed from an overall determination of compliance.

> Equal opportunity to participate lies at the core of Title IX's purpose. Because the [effective accommodation analysis] delineates this heartland, we agree that the district courts that have so ruled and hold that, with regard to the effective accommodation of students' interests and abilities, an institution can violate Title IX even if it meets the "financial assistance" and "athletic equivalence" standards. In other words, an institution that offers women a smaller number of athletic opportunities than the statute requires may not rectify that violation simply by lavishing more resources on those women or achieving equivalence in other respects. (*Cohen II*, 1993, p. 897)

Having concluded that effective accommodation was "the point of departure for evaluating compliance," the courts went on to apply the Policy Interpretation's three-pronged analysis to the facts presented, summarily noting that a thirteen point disparity between the percentage of women athletes and the percentage of women undergraduates at the University failed to satisfy the first test of "substantial proportionality" (*Cohen I*, 1992, p. 991).[23] As a matter of law, the appellate court noted, "proportionality" furnishes a "safe harbor" from Title IX liability, and institutions not wishing to engage in extensive compliance analysis "may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup" (*Cohen II*, 1993, pp. 897-98).

The second and third parts of the effective accommodation analysis, "a history and practice of continuing program expansion" and "full and effective accommodation," according to the appellate court, reflect "that there are circumstances under which, as a practical matter, something short of [] proportionality is a satisfactory proxy for gender balance" (*Cohen II*, 1993, p. 898). In applying the second test, however, the district court found that although Brown had significantly increased opportunities for female athletes in the 1970's, a ten-year hiatus failed to demonstrate a *continuing* practice of program expansion (*Cohen I*, 1992).[24]

The third test, the appellate court remarked, "sets a high standard" (*Cohen II*, 1993, p. 898). "[I]t demands not merely some accommodation, but 'full and effective accommodation.' If there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution necessarily fails this prong of the test" (*Cohen II*, 1993, p. 898). In applying this final test the district Court found that the University's demotion of two women's teams in which "there is great interest and talent" was indicative of something less than full and effective accommodation and concluded that Brown was in violation of Title IX, ordering the University to submit a comprehensive plan for achieving compliance (*Cohen III*, 1995, pp. 211-212).

Brown, of course, resisted each of the courts findings on both legal and empirical grounds.[25] The most important of its arguments involved the charge that the third prong of the analysis requires an institution to accommodate every expression of student interest "to the fullest extent until the substantial proportionality of prong one is achieved," thus imposing "preferential or disparate treatment to members of one sex on account of an [statistical] imbalance" in contravention of both Title IX (§1681[b]) and the Equal Protection Clause (*Cohen IV*, 1996, pp. 174-175).

The response to Brown's argument was most fully developed in the First Circuit's second review of the case in 1996 (*Cohen IV*). There, the court emphatically stated that this "is not an affirmative action case" (*Cohen IV*, 1996, p. 169). With regard to the specific charge that the effective accommodation analysis mandates the use of gender-based preferences and quotas, the court held that because the analysis provides two ways to demonstrate compliance that are unrelated to proportionality, the analysis violates neither equal protection guarantees nor Title IX's own prohibition on preferential treatment (*Cohen IV*, 1996). "The question of substantial proportionality under the Policy Interpretation's three-part test," the court asserted, "is merely the starting point for analysis, rather than the conclusion; a rebuttable presumption rather than an inflexible requirement" (*Cohen IV*, 1996, p. 171).

In addition to the University, however, there were others who were not persuaded that the different elements of the effective accommodation analysis should be viewed in isolation for the purposes of analysis under Title IX's own ban on the use of preferences or equal protection doctrine, because a determination of compliance necessarily involves all three tests (*Cohen IV*, 1996). In his dissenting opinion, for example, the Chief Judge of the First Circuit stated that "[i]n my view it is the result of the test, and not the number of steps involved, that should determine if a quota system exists" (*Cohen IV*, 1996, p. 196).

While agreeing that "no aspect of the Title IX regime at issue...mandates gender-based preferences or quotas," Judge Torruella argued that taken together the three tests comprise "an affirmative action, quota-based scheme" (*Cohen IV*, 1996, p. 196).

> The majority claims that 'neither the Policy Interpretation nor the district court's interpretation of it mandates statistical balancing.' The logic of this position escapes me ... The first prong ... surely requires statistical balancing ... The second prong ... is essentially a test that requires the school to show that it is moving in the direction of satisfying the first prong. Establishing that a school is moving inexorably closer to satisfying a requirement that demands statistical balancing can only be done by demonstrating an improvement in the statistical balance ... Finally, the third prong ... goes farther than the straightforward quota test of prong one ... the unmet interests of the underrepresented sex must be completely accommodated before any of the interest of the overrepresented gender can be accommodated. *(Cohen IV*. 1996. p. 196)

A similar conclusion was reached in *Pederson v. Louisiana State University* (1996) where, on the belief that the interpretation of the effective accommodation analysis in *Cohen* and *Roberts* advanced the use of prohibited preferences and quotas, the Western Louisiana District Court refused to follow those decisions. In their acceptance of proportionality as an appropriate test of Title IX compliance, the court stated:

> [those cases] strongly rely on each other and on a stated administrative deference ... However, the jurisprudential emphasis on numerical "proportionality" is not found within the statute or the regulations; rather, it is inferred from language in the Policy Interpretation and ignores other language within the Policy Interpretation and the statute which argues against such an inference. (*Pederson*, 1996, pp. 911-912)

Moreover, insofar as statistical tests of compliance run counter to the statutory objective acknowledged by the Supreme Court in both *Cannon* and *Franklin* of protecting *individuals* from discrimination, and preferential treatment based on such tests is explicitly prohibited, the court concluded that the deference accorded in *Cohen* and *Roberts* to OCR's Policy Interpretation was misplaced (*Pederson*, 1996). Judicial deference to administrative interpretative discretion, the court observed, is not absolute since it is the inevitable role of the courts to "say what the law is" (*Pederson*, 1996 quoting *Stinson v. United States*, 1993).[26]

Discussion

As Brown University discovered–to briefly recap the import of the past twenty-five years of policy development in this one area of regulated activity–Title IX athletic regulation is an animal with teeth. Without any other prerequisite, a private action may maintained on the basis of an institutions' failure to maintain statistical "proportionality", compensatory damages may be awarded to redress individual harm, and court-orders may be issued to expand offerings for women athletes, coercing a redistribution of resources within athletic departments.

Whatever view one takes of this regulatory machinery and its relationship to Title IX, however, it is abundantly clear that there was no organized effort to deliver colleges and universities into the hands of federal bureaucrats, no furtive plot to deprive them of their autonomy or academic freedom. Having said that, the parallels between the existing requirements and the broader (but unenacted) purposes of Title IX do lend themselves to a depiction of the agencies and courts struggling to cast off the statute's express and implied limitations in order to achieve a different vision of "equality", particularly with regard to athletics. The emphasis on statistical proportionality, in particular, can be seen as a reflection of the widely held belief that interest and ability follow opportunity.

Threads of Explanation: Policy Conflicts

Much as Clune's model suggests, the decisions and events described above can be seen as manifestations of two distinct lines of disagreement, or policy conflicts, over the goals of Title IX first which were first encountered during the formation of the statute: "total versus qualified equality" and "equality versus autonomy".

"Total" Versus "Qualified" Equality

This conflict was first evident in the attempt on the part of women's groups to emulate federal policy regarding race discrimination in their constitutional litigation strategy, the ERA, and in the early stages of the legislative effort which led to the creation of Title IX itself. Each of those efforts advanced a "no exceptions" policy premised on the belief that sex, like race, is an immutable characteristic not effecting an individual's abilities, and therefore an inequitable basis for differential treatment.

By rejecting the proposal to regulate sex discrimination through a simple extension of Title VI of the Civil Rights Act (1964) and providing express exemptions for certain types of institutions (not found under Title VI), however, Congress tacitly rejected the use of race policy as a benchmark for Title IX protection. Instead, lawmakers chose to honor the distinctions between race and sex discrimination in constitutional law, diverting Title IX from the path of "total equality" onto a path of "qualified equality."

The second iteration of this conflict involved the struggle, prior to enactment, over exemption of admissions policies from Title IX coverage–correctly seen by women's groups as the lynchpin of Title IX protection insofar as admissions policies have a direct bearing on access to educational opportunities. Arguments advanced by higher education leaders and their congressional allies in this instance bore the implicit assumption that Title IX was a "qualified" statement of nondiscrimination policy contemplated to accommodate the legitimate needs of institutions; an assumption which Congress partially validated by exempting the admissions policies of the more insular and tradition-bound private institutions.

The third iteration surfaced in the form of attempts to exempt revenue-producing sports from the regulations, a move thought to be justified by redistributive nature of the statute and the economic realities of athletic programming. In refusing to exempt those programs, however, Congress declined the invitation to further qualify Title IX's protections and provided one illustration of the relative weights it accorded to the statutes' goals and competing institutional demands. Economic necessity (especially where it derives from artificially imposed financial constraints), lawmakers apparently concluded, is an insufficient basis for abrogating the goals of the statute.

The final (and perhaps, ongoing) iteration of the conflict over the total vs. qualified nature of Title IX protection concerns "causation" seen in the shifting standards of accountability for differences in male and female interest in athletic participation. The earliest indication of tensions in this area involved the inclusion in Title IX of a provision prohibiting the use of preferential treatment to correct "statistical imbalances" (§1681[b]); familiar features of affirmative action programs which seek, without assigning fault, to redress the effects of societal discrimination by ensuring access.

Notwithstanding that express limitation, the issue resurfaced in DHEW's first formulation of its athletic regulations which included the imposition of "affirmative efforts" to cultivate and then accommodate female interest in participation. Following a torrent of negative feedback, and faced with the prospect of congressional review of its regulations however, the agency recanted, and in its second formulation of the regulations limited the reach of "effective accommodation" to existing student interest and relegating the test to the status one of host of other considerations focused on the equitable distribution of the "material benefits" of athletic participation.

"Clarifying" the regulations five years later, however, OCR returned to the more aggressive approach, specifying that compliance with the effective accommodation component of the regulations would be assessed by reference to the "proportionality" of male and female participation in athletic programs with their respective rates of undergraduate enrollment and, failing that inquiry, demonstrations of either a history of program expansion for women or satisfaction of every female interest in participation.

As several courts later realized, the difference between ensuring equal opportunity and remedying the effects of societal discrimination under this "three-pronged" analysis is not an intuitive one. In *Cohen*, in particular, the courts expended a great deal of energy attempting to distinguish the analysis to avoid its condemnation under Title IX's ban on preferences and statistical balancing. The courts, moreover, succeeded in compounding the causation problem by holding that a failure of the effective accommodation analysis alone is sufficient to support a finding of noncompliance without, importantly, having to reach a determination of whether the institution's policies and practices created the disparity.

The difficulty of applying Title IX's requirements to athletic programs, to summarize, has led to the creation of regulatory framework which arguably shifts the responsibility for societal influences on women's interest in sports to colleges and universities.[27] Whatever its source, that result is obviously more congruent with the goals of affirmative action, perhaps the highest expression of "total equality," than with the qualified form of equality exhibited in Title IX.

Equality vs. Autonomy

Most of the competing demands encountered throughout Title IX implementation, of course, arose from the "right" of institutions to self-determination. Depending on the context, this alleged prerogative has been alternatively characterized as an essential element of academic freedom and as an expectation arising from Congress' longstanding, but informal policy of not interfering in college and university affairs.

The initial definition Title IX jurisdiction provides the earliest indication of the conflict between these claims to institutional autonomy and the broad social purposes underlying Title IX. In that instance, lawmakers rejected a Senate version of the statute extending coverage to institutions in receipt of federal assistance before, perhaps in recognition of its tradition of nonintervention, limiting coverage to recipient "programs" and "activities" (20 U.S.C. §1681). To reinforce this limitation, moreover, a provision was inserted stating that the termination of federal assistance shall be "limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found"; meaning, by direct inference, that only those programs in direct receipt of federal assistance could be penalized for noncompliance (20 U.S.C. §1682).

The second illustration of this conflict involves an event discussed previously; Congress' exemption of the admissions policies of private institutions. In that debate, conservative lawmakers asserted that the imposition of Title IX would invade the academic freedom of colleges and universities to determine their own educational policy, chiefly by dictating an "appropriate" ratio of men and women (Cong. Rec., 1971; 39,249). Opponents of the exemption, on the other hand, responded that disguising gender bias as a component academic freedom not only did not make it legitimate, but disparaged women and nullified the concepts of social responsibility, taxpayer equity, and civil rights (Cong. Rec., 1971).

A third example is DHEW's interpretation of Title IX coverage in the regulations. A broad interpretation of the statute's jurisdiction, the agency obviously understood, would vastly expand its potential to combat discrimination. Veering sharply from a literal interpretation of the statute's scope to make Title IX coverage as comprehensive as possible, accordingly, DHEW showed itself more responsive to the broad purposes of the statute articulated in the its legislative history than to the technical expression of that purpose in the mandate. If the proposition was ever in doubt, an examination of the awkward legal reasoning used to justify its extension of coverage to "institutional" recipients of federal assistance imparts a definite sense of an agency attempting to "break out of the constraints of the cautious compromises contained in many implementation mandates" (Clune, 1983, p. 62).

When the jurisdiction issue was revisited in *Grove City* (1984), by contrast, although finding strong evidence of a congressional intent to make Title IX jurisdiction coextensive with the indirect receipt of federal student aid, in a highly conflicted opinion the Supreme Court refused to give effect to that finding–demonstrating an eagerness to accord greater weight to institutional concerns than to the broad social purposes it had recognized and acted upon in an a Title IX case just five years earlier (*Cannon*, 1979). Congress, of course, had the final word in this controversy when with the Civil Rights Restoration Act (1987) it affirmed the institutional form of coverage advanced in the regulations, once again realigning the statute's balance between equality and autonomy.

Finally, there are the decisions in *Cannon* (1979) and *Franklin* (1992) where the Supreme Court was seen liberally imputing intent to Congress to advance Title IX enforcement. By enabling private litigants to meaningfully enforce the statute, the Court removed an important limitation of the statute which had effectively sheltered institutions from decisive intervention.

Final Observations

Although it the intention of the foregoing analyses was not to establish a discreet, causal connection between the policy conflicts encountered during the formation of the mandate and the direction of athletic policy development, those analyses do offer some general reinforcement of several of assertions put forward in Clune's political model of implementation. One of those assertions, to reiterate, is that because implementation is essentially a "submersion of policy in politics," objectives must be expected to change (Clune, 1983). In the immediate context nothing could be clearer. From a highly confined expression of nondiscrimination policy, Title IX policy currently embraces programs as economically insular as athletics, and is arguably less concerned with rectifying the discriminatory conduct of colleges and universities than societal attitudes about female participation in sport.

How all of that development came about, of course, is the question of greatest interest, and the one greatest difficulty. An additional ambition of this study, notwithstanding, has been to examine several of Clune's higher-order assertions relating to that question; that implementation is a "recursive" process in which changes occurring in implementation typically involve the conflicts first encountered in the formation of the mandate, that implementation is a process in which developments are often initiated by the interaction of interested participants, and that legal decisionmaking in implementation is infused with public policy discourse (either explicit or implied).

On the first score, analysis in the preceding section revealed that Title IX policy development has revolved around at least two ongoing conflicts; total vs. qualified equality, and equality vs. autonomy. Any issue or event, of course, may be painted to look like another if the brush used is broad enough, but enough specific examples exist to confidently conclude that these conflicts have exerted a durable influence on Title IX development. The debate over proportionality culminated in *Cohen* for example, provides a tidy illustration of the struggle over Title IX's identity as either a remedial program or one limited to prohibiting the consideration of gender by colleges and universities first seen in efforts to emulate policies regarding race discrimination.

Whether the history and analysis produced here have shown Title IX implementation to be a politically interactive process is another matter of interpretation, but an intuitively more difficult one because much of the development that occurred emanated from a single source: DHEW and its successor, OCR. In the majority of instances DHEW and OCR rather than Congress or the courts, was the facilitator of change, as for example in the extension of Title IX coverage to the beneficiaries of federal assistance, and the invention of regulations and guidelines giving the program a more pronounced remedial focus.[28]

Although the agencies crowded the field, there are also concrete examples of the different elements of government responding to one another's actions in ways that have precipitated developments. Perhaps the most volatile of those interactions involved the "give and take" surrounding the definition of Title IX coverage, where DHEW's expansive interpretation of coverage prompted rumblings in Congress, followed by the displeasure of the Supreme Court, and ultimately the approval of a different body of legislators. A different but equally responsive pattern, moreover, is visible in the later stages of implementation where OCR and the courts engaged in a "give and give" relationship, ladling gravy onto to one another's efforts to make substantial proportionality the measure of compliance.

Judging from the "deconstruction" of several Title IX developments conducted in an earlier section of this paper, the third of Clune's assertions, that legal decisionmaking in implementation is infused with public policy discourse, seems supremely obvious. From a legal perspective, for example, the decisions of DHEW, whose actions were almost uniformly more consistent with a desire for the most comprehensive and remedial provisions than with the limitations delineated in the mandate, can only be described as "unconventional". Unconventional in the sense that its actions and explanations gravitated toward the least supportive authority, and in the sense that its sympathy for the underlying purposes of the statute was almost candid.

Further, although few court opinions are what they initially appear due to the inherent complexity of legal reasoning, it is possible to spot "activism" even when it emanates from an organization as legally accomplished as the Supreme Court. In the course of implying both a right of action and a damages remedy, for example, the Court's efforts to impute knowledge and decisions to Congress impart an unmistakable sense of result-oriented jurisprudence. From a public policy standpoint on the other hand, those decisions make excellent sense.

Many of the decisions examined, in fact, were plainly "result-oriented" and legalistic detail seemed to be provided more in the way of an assertion of how the law might be developed to support a desired outcome than to demonstrate how the contemplated action actually squared with the mandate or regulations. The reasoning employed by the different courts in *Cohen* to uphold OCR's effective accommodation analysis and sever the analysis from the other aspects of the regulation is illustrative. There the courts rather summarily deferred to OCR's interpretative authority and then fiercely endeavored to distinguish the effective accommodation analysis in such a way that it could be rescued from Title IX's ban on preferences and statistical balancing.

A few things, to conclude, seem clear from a simple reading of Title IX: that it prohibits sex discrimination in those programs over which Congress has direct control (owing to the receipt of federal assistance); that it is a qualified ban on sex discrimination (as it includes important exemptions and limitations); that the use of preferences to correct statistical imbalances is forbidden; and that enforcement is to be affected by administrative agencies primarily through the termination of funds. If these very literal translations of the statute can be characterized as the "expectations" shared at the outset of the program, this study has shown that those expectations, depending on one's perspective, have either been exceeded or ignored.

Correspondingly, therefore, much of potential for the invasion of institutional prerogatives feared by institutions in the policy formation process, has been realized. Currently, for example, colleges and universities face much greater exposure to Title IX regulation than presaged by the compromises reached on the issues of coverage, enforcement and remedial obligations during the formation of the statute.

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[1] Mr. Hunt received his J.D. and a Ph.D. in Higher Education Administration from the University of Utah. This paper was extracted from his 1997 doctoral dissertation *Implementation and the Expansion of the Mandate, a History And Critical Legal Analysis of Twenty-five Years of Title Ix Athletic Policy Development.*

[2] See *Brenden v. Independent School District* (1973); *O'Connor v. Board of Education* (1973); *Leffel v. Wisconsin Interscholastic Athletic Association* (1978); and *Hoover v. Mickeljohn* (1977).

[3] The 1969 Report of the Presidential Task Force on Women's Rights and Responsibilities, for example, stated:

> Equality for women is unalterably linked to many broader questions of social justice. Inequities within our society serve to restrict the contribution of both sexes ... What this Task Force recommends is a national commitment to basic changes that will bring women into the mainstream of American life. Such a commitment, we believe, is necessary to healthy psychological, social and economic growth of our society. The leader who makes possible a fairer and fuller contribution by women to the nation's destiny will reap *dividends of productivity measurable in billions of dollars ...* (p. 38, emphasis added)

[4] At the time laws and policies resulting in the differential treatment of men and women were sustained under equal protection analysis if they bore a reasonable relationship to some legitimate governmental objective. The "strict scrutiny" extended to racial classifications, by contrast, demanded that laws and policies be narrowly tailored to affect a *compelling* government interest.

[5] The Equal Rights Amendment provided that: "equality of right under the law shall not be denied or abridged by the United States or by any state on account of sex."

[6] Minority groups already covered by Title VI, moreover, were wary that an amendment banning sex discrimination under Title VI could give rise to a political backlash which could threaten their own protection.

[7] It was fortuitous for Title IX proponents therefore, that in 1972 a House-Senate Conference Committee substituted a provision from the Senate version of Title IX which, instead of exempting all admissions policies from coverage, exempted only private, undergraduate programs (Fischel & Pottker, 1977).

[8] Another important aspect of this interpretive exercise which helped furnish DHEW's "institutional" vision of Title IX coverage was the assertion that federal assistance could be terminated if the program in direct receipt of that assistance was either administered in a discriminatory manner or the funds were used

to support a discriminatory program within the same institution. (Fed. Reg., 1974, p. 22,228). This assertion of remedial authority would enable the agency to enforce the regulations by penalizing directly funded programs for discrimination found in programs theoretically benefitting from that assistance. Critics, however, were quick point out that this approach contravened the express intent of the statute's enforcement provision which provides:

> Compliance with any requirement adopted pursuant to this section may be effected by [] the termination of or refusal to grant or continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record ...but *such termination or refusal shall be limited to the particular political entity or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found* ... (20 U.S.C. §1682, emphasis added)

[9] Apart from an inconsistency with the express language of Title IX there are at least three additional contradictions of which DHEW was fully aware. First, prior to enactment Congress had specifically rejected a version of the statute advancing institutional coverage, choosing to more closely tailor the statute to the limits of its own power to condition appropriations (Cong. Rec., 1971). Second, the "maintenance of effort" requirements routinely attached to federal categorical aid (which assure that federal funds supplement rather than supplant state or local funds) essentially make it illegal for institutions to use those funds to support other programs (BYU L. R., 1976; Kuhn, 1976). And third, within the same ruling on which DHEW placed its sole reliance (*Finch*), the court went on to state that the agency could not affect compliance by threatening a termination of funds without demonstrating that the program in direct receipt of funds was itself discriminatory (*Finch*, 1969). Absent the power to enforce compliance, in other words, an extension of coverage to indirect beneficiaries would be meaningless.

Equally compromising detail surrounded DHEW's decision to include federal student financial aid within the definition of "assistance", including the remark prior to enactment by Title IX's Senate sponsor Birch Bayh that "[i]t is unquestionable in my judgement, that this would not be directed at specific assistance that was being received by individual students..." (Hearings on Title IX Regulations, 1975, p. 481). In the sole case cited by the agency in support of the inclusion of student aid, *Bob Jones University v. Johnson* (1974), moreover, the Fourth Circuit had specifically determined that neither Title VI's language nor its legislative history revealed an intent to exempt veterans' education benefits from coverage (1974, p. 604).

Further undermining the agency's position on these issues was uncertainty over the automatic application of precedents established under Title VI with regard to race discrimination, to sex discrimination under Title IX (BYU L. R., 1976). Although numerous references were made concerning the parallel nature of the two statutes prior to enactment, constitutional law differentiates treatment of race and sex classifications (Hearings on Title IX Regulations, 1975). A court as in *Bob Jones*, accordingly, would be justified in giving broader meaning to "federal assistance" under Title VI in order to "interdict constitutionally impermissible racial discrimination" than it would under Title IX whereas many sex-based classifications are constitutionally permissible (BYU L. R., 1976, p. 167). The unqualified application of Title VI precedent to the interpretation of Title IX, in this view, would have an unwarranted, expansive effect on Title IX doctrine.

[10] The use of separate men's and women's teams (an otherwise impermissible gender classification under Title IX) to ensure that women are not "effectively" excluded from participation by the differences lack of

size, experience or ability, for example, complicates the picture because they involve the duplication of a host of fixed costs such as coaching salaries, facilities and upkeep, in addition to increases in such operating expenses as travel and accommodation (Iowa L. R., 1975). The proposed regulations allowed institutions to sponsor separate teams so long as they provided equipment and supplies in a nondiscriminatory manner (Fed. Reg., 1974).

[11] It is important to note in this regard that the regulations explicitly reject equal aggregate expenditures on men's and women's teams as the test of compliance and instead simply obligate institutions to provide the funds "necessary" to ensure that the opportunities provided are of substantially similar quality (Fed. Reg., 1975; 21,143 §86.41[c]). These considerations were not lost on the NCAA which, in a 1974 letter writing campaign and in the 1975 congressional hearings on the regulations, continued its effort to exempt revenue-producing sports from coverage in order to preserve existing levels of expenditure on those highly visible programs. (Hearings on Title IX Regulations, 1975, p. 101) Although the interaction of the regulations' effective accommodation and separate team provisions continue to exert pressure on athletic departments to equitably distribute the "material benefits" of participation in athletic programs, these requirements are far less prescriptive than the wholesale redistribution of income suggested by the proposed regulations.

[12] Congress' "approval" actually came in the form of an inability to pass a joint resolution disapproving of the regulations. The resolution was put forward by lawmakers who deemed DHEW's interpretation of Title IX, particularly its interpretation of coverage, to be so aggressive as to be "ultra vires," or beyond the rulemaking authority of the agency (Hearings on Title IX Regulations, 1975; Kuhn, 1976).

[13] Another important aspect of this mechanism is the treatment of student interest assessments which the regulations left for institutions to "consider by a reasonable means it deems appropriate" (Fed. Reg., 1975, p. 24,135). Reminiscent of the "affirmative effort" requirements under the proposed regulations, the Policy Interpretation provides:

> Institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided: [they] take into account the nationally increasing levels of women's interests and abilities ... do not disadvantage the members of an underrepresented sex ... take into account team performance ... [and] are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex. (Fed. Reg., 1979, p. 71,417 emphasis added)

[14] The Court cited *Bossier Parish School Board v. Lemon* (370 F.2d 847 [5th Cir. 1967]), adding that the case had been "repeatedly cited with approval and never questioned during the ensuing five years" (*Cannon*, 1979, pp. 697-698). Equally persuasive, in the Court's view, was the fact that Title IX was "enacted against a backdrop of three recently issued implied-cause-of-action decisions of this Court involving civil rights statutes with language similar to that in Title IX" (*Cannon*, 1979, p. 698 ftn 22). Citing *Sullivan v. Little Hunting Park* , (1969), *Allen v. State Board of Elections* (1969) and *Jones v. Alfred H. Meyer Co.* (1968).

[15] Only a single aspect of the Court's four-part analysis, Powell observed, dealt with legislative intent, which he viewed as the only legitimate basis for implying a right of action, while the other three he characterized as invitations to judicial lawmaking (*Cannon*, 1979) Powell's treatment of the three remaining *Cort* factors was couched less in the facts of *Cannon* than in his objections to the entire practice of implying rights of action (Loftis, 1989). On this basis, his dissent has been recognized as the "doctrinal foundation for the Court's [subsequent] retreat from the liberal implication doctrine" and as the "judicial birth of the New Erie doctrine" (i.e., the judicial policy of non-interference with the decisions committed by

the Constitution to the other branches of government) (Doernberg, 1990, p. 766; Loftis, 1989, p. 350).

Powell took particular exception to that aspect of the *Cort* analysis calling for a judicial determination of the consistency of a private right of action with the "underlying purposes" of the legislative scheme because it "permits a court to decide for itself what the goals of a scheme should be, and how those goals should be advanced" (*Cannon*, 1979, p. 741). Even if such invasions of the legislative prerogative could be construed as constitutional, he asserted, they should nevertheless be avoided because they encourage Congress to "shirk its constitutional obligation and leave ... the courts to decide" (Loftis, 1990).

[16] Following *Cannon*, courts grappled with the issue of with how to resolve the Title IX grievances with which they were dealing in increasing numbers. After a period of uncertainty and reliance on injunctive remedies–which often led to the dismissal of lawsuits brought by students who had graduated by the time appeals were taken–that question was answered by the Supreme Court in *Franklin* (1992). Building on the private cause of action inferred in *Cannon* (and imputing a generally agreeable intent to Congress based on its actions following that decision), *Franklin* affirmed the power of the Federal courts to fashion any appropriate remedy, including monetary damages, to vindicate Title IX violations.

[17] The number of decisions issued in six cases commenced in 1992, for example, exceeded the number of decision involving athletics rendered during the first 19 years of Title IX's existence (Heckman, 1994).

[18] Including whether men's and women's programs should be compared on a sport by sport basis, on a same-sport basis, or on a program-wide basis (i.e., all the men's and women's teams within an athletic department) and which party bears the burden of proof for each component of the three-pronged effective accommodation test.

[19] Cohen is most illustrative of the limits of the analysis because Brown University had made significant strides following the enactment of Title IX to increase and improve its athletic program for women and, at the time, had an equal number of men's and women's teams, and female athletic participation in excess of 38%, considerably greater than that of most other institutions (Evans, 1996).

[20] The case involved two trials at the district court level, one on a preliminary injunction and another "on the merits," two appeals, and a petition for review by the Supreme Court.

[21]

> Whether Brown's concept [of the effective accommodation analysis] might be thought more attractive, or whether we, if writing on a pristine page, would craft the regulation in a manner different than the agency, are not very important considerations. Because the agency's rendition stands upon a plausible, if not inevitable, reading of Title IX, we are obligated to enforce the regulation according to its tenor. (*Cohen II*, 1993, p. 899)

The court drew its authority for this position from *Chevron v. Natural Resources Defense Council* (1984) a case in which the Supreme Court stated that a "court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold [it]" (*Chevron*, 1984, p. 843). Elsewhere the court noted:

> Although [OCR] is not a party to this appeal, we must accord its interpretation of Title IX appreciable deference. The degree of deference is particularly high in the Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX. (*Cohen II*, 1993, p. 895)

Ironically, the court traced the source of OCR's "explicit delegation" to none other than the 1974 Javits

Equal Opportunity in Interscholastic Athletics: Identifying and Eliminating Gender Barriers

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I. Introduction

A. Challenging The Barriers of Inequity

1. In 1972 Congress declared that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance" 20 U.S.C. §1681(a).

2. Over 25 years after the passage of Title IX of the Education Amendments of 1972, many people believe that school districts nation-wide have successfully managed to ignore Congress' declaration of gender equity as it pertains to interscholastic athletics.
    a. Many advocates of girl's interscholastic athletics charge that school districts get away with providing fewer opportunities for girls to play sports than boys. These same advocates also claim that girls suffer inequity compared to boys when comparisons are made concerning equipment, practice and game facilities, coaches salaries, publicity, etc.

A. History of Title IX and its Impact on Interscholastic Athletics

1. Title IX became law on July 1, 1972. It specifically recognizes the problem of sex discrimination and prohibits such discrimination in any educational program, organization or agency that receives federal funds.

a. According to the U.S. Department of Education's Office for Civil Rights (OCR), "the legislative history of Title IX clearly shows that it was enacted because of discrimination that currently was being practiced against women in educational institutions."

b. Chief Senate sponsor of Title IX, Birch Bayh, stated that Title IX was designed to be "a strong and comprehensive measure [that would] provide women with solid legal protection from ... persistent discrimination which was serving to perpetuate second-class citizenship for American women."

2. Interscholastic sports are not specifically mentioned in the statute, nor were sports really considered in the Congressional debates prior to enactment of Title IX.
   a. In 1974, Congress passed the Javits Amendment which charged the Department of Health, Education and Welfare (now known as the Department of Education) with preparing and publishing Title IX regulations which would cover athletic activities.
   b. The Title IX "Regulations" - 34 C.F.R. §106 (1992) - became effective on July 21, 1975.

3. Following numerous complaints alleging sex discrimination in athletics, the OCR issued a policy interpretation "to provide a framework within which ... complaints can be resolved, and to provide institutions of higher education with additional guidance on the compliance with Title IX in intercollegiate athletic programs." This OCR publication can be found in 44 Fed. Reg. 71413 (1979).
   a. The 1979 "*Policy Interpretation*" sets out in more detail operative rules for determining whether an athletic program is in violation of Title IX.
   b. Section III of the "*Policy Interpretation*" notes that the general principles will often apply to interscholastic programs, which are also covered by the Title IX Regulations.

4. There have been several significant U.S. Supreme Court cases and congressional statuary enactments which have affected gender equity in interscholastic athletics.
   a. *Cannon v. University of Chicago*, 441 U.S. 677 (1979) - The Court held that Title IX creates an implied private right of action

without the requirement that administrative remedies first be exhausted.

b. *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982) - The Court upheld the Title IX Regulations by concluding that Congress' failure to disapprove the "Reg" creates the inference that the "Regs" are consistent with legislative intent.

c. *Grove City College v. Bell*, 465 U.S. 555 (1984) - The Court retreated from its history of broad construction of Title IX by narrowly interpreting the statutory "program or activity" language to apply only to those specific programs or activities within an institution that directly receives federal financial assistance (*Grove City* was legislatively overruled by Congress in 1987).

d. *The Civil Rights Remedies Equalization Amendment of 1986* - 42 U.S.C. §2000-7 - Through this Act, Congress created an express Eleventh Amendment waiver and allowed claims for monetary damages under Title IX against state defendants.

e. *The Civil Rights Restoration Act of 1987* - 20 U.S.C. §1687 - In this Act, Congress defined the terms "program" and "activity" broadly, bringing each and every part of a school district within Title IX purview if a district receives federal funds for any purpose.

f. *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028 (1992) - The Court held that monetary damages are available under Title IX in cases of intentional discrimination.

II. The Title IX Interscholastic Athletics Framework

A. Sources of Authority

1. Because the statutory language of Title IX does not specifically address sex discrimination in interscholastic athletics, other sources of law supplementing Title IX must be consulted. These primary sources include:
    - a. *The Title IX Regulations* - 34 C.F.R. §106 et seq. (1992)
    - b. *The Policy Interpretation* - U.S. Department of Education, Office for Civil Rights Athletic Guidelines - 44 Fed. Reg. 71413 (1979)
    - c. Developing case law

d. *The Title IX Athletics Investigator's Manual* - Office for Civil Rights, Department of Education, (1990)

e. *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test - Office for Civil Rights*, Department of Education (1996).

B. Three Primary Areas of Analysis

1. There are three basic areas to be considered in analyzing whether student-athletes are the victims of prohibited sex discrimination in interscholastic athletics. The following areas comprise the program components scrutinized by the OCR:
   a. Athletic financial aid - 34 C.F.R. §106.37(c)
   b. Effective accommodation of student interests and abilities - 34 C.F.R. §106.41(c)(1)
   c. Other athletic benefits and opportunities - 34 C.F.R. §106.41(c)(2)-(10)

C. Interscholastic Violations - Generally

1. Interscholastic athletics investigations by the OCR may be limited to those program components in which a complainant has raised allegations of discrimination (intercollegiate investigations typically include the entire athletic program.

III. Athletic Financial Assistance

A. Overview

1. The Title IX "Regs" indicate that institutions must provide reasonable opportunities for [athletic scholarship awards] for members of each sex in proportion to the number of students of each sex participating in intercollegiate athletics.

2. The 1990 *Title IX Investigator's Manual* provides, "It is highly unlikely that an elementary or secondary institution will provide athletic financial assistance. Therefore, an interscholastic investigation is not likely to include this program component."

IV. Effective Accommodation of Student Interests and Abilities

A. Overview

1. The Title IX "Regs" require institutions that offer athletic programs to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and the level of competition available to members of both sexes.

B. The 3-Part Test

1. The OCR's 1979 *Policy Interpretation* gives a school district three (3) separate ways to determine how it will provide students of each sex with nondiscriminatory opportunities to participate in interscholastic athletics. If a district meets any of the three prongs, the OCR will consider that the district is meeting this component of effectively accommodating students interests and abilities.
   a. *Part 1 of the 3-Part Test.* - Part 1 asks whether interscholastic level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments. For example, if a school's enrollment is 52% male and 48% female and 52% of the participants in the athletic program are male and 48% are female, then the school would clearly satisfy Part 1 of the 3-Part Test.
   b. *Part 2 of the 3-Part Test.* - Part 2 focuses on where members of one sex (usually females) have been and are underrepresented among interscholastic athletes, whether the school can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of that sex. In effect, Part 2 looks at a school's past and continuing remedial efforts to provide nondiscriminatory participation opportunities for females through program expansion.
   c. *Part 3 of the 3-Part Test.* - Part 3 focuses on where members of one sex (usually females) are underrepresented among interscholastic athletics, and the school cannot show a continuing practice of program expansion (Part 2 of the test), whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program. There are three

conditions considered in determining whether a school has met Part 3 of the test. These include:

1. Is there sufficient unmet interest to support an interscholastic sports team?
2. Is there sufficient ability to sustain an interscholastic team?
3. Is there a reasonable expectation of competition for the team?

V. Other Athletic Benefits and Opportunities

A. Overview

1. *The Standard.* - Equivalence in the treatment of both sexes is the standard for judging compliance in the area of athletic benefits and opportunities.

2. *Permissible Differences.* - Identical treatment is not required if the overall effect of the differences is negligible or if the differences result from nondiscriminatory factors. Some aspects of athletic programs may not be equivalent for boys and girls because of the unique aspects of particular sports. Differences may include:
   a. rules of play,
   b. nature and replacement of equipment,
   c. rates of injury in different sports,
   d. nature of the facilities needed,
   e. maintenance and upkeep of facilities, and
   f. crowd size and cost of managing various athletic events.

B. Program Component: Provision of Equipment and Supplies - 34 C.F.R. §106.41(c)(2)

1. The 1979 *Policy Interpretation* states "Equipment and supplies include but are not limited to uniforms, other apparel, sport-specific equipment and supplies, instructional devices, and conditioning and weight equipment." The *Policy Interpretation* lists five general factors in determining equivalent opportunities under this component:
   a. quality,
   b. amount,
   c. suitability,
   d. maintenance and replacement, and

   e. availability of equipment and supplies.

C. Program Component: Practice Times - 34 C.F.R. §106.41(c)(3)

1. The 1979 *Policy Interpretation* lists the following five factors to be assessed in determining equivalency of opportunity:
   a. number of competitive events per sport,
   b. number and length of practice opportunities,
   c. time of day competitive events are scheduled,
   d. time of day practice opportunities are scheduled, and
   e. opportunities to engage in available pre-season and post-season competition.

2. The length of the season may also be a factor to be assessed, however the competitive season is often determined by state athletic associations.

D. Program Component: Travel and Per Diem Allowances - 34 C.F.R. §106.41(c)(4)

1. The *Policy Interpretation* lists the following five factors to be assessed in determining equal opportunity equivalency:
   a. modes of transportation,
   b. housing furnished during travel,
   c. length of stay before and after competitive events,
   d. per diem allowances, and
   e. dining arrangements.

E. Program Component: Opportunity to Receive Academic Tutoring - Assignment and Compensation of Academic Tutors - 34 C.F.R. §106.41(c)(5) & (6)

1. The OCR's 1990 *Title IX Athletics Investigator's Manual* states: "It is very unusual for an elementary or secondary education institution to provide tutors to its students, and even more unlikely that tutors would be provided specifically to athletes."

F. Program Component: Opportunity to Receive Coaching - Assignment and Compensation of Coaches - 34 C.F.R. §106.41(c)(5) & (6)

1. The *Policy Interpretation* lists the following three factors to be assessed in determining equivalency for the opportunity to receive coaching:
   - a. the relative availability of full-time coaches,
   - b. the relative availability of part-time and assistant coaches, and
   - c. the relative availability of graduate assistants and volunteer coaches.

2. The *Policy Interpretation* lists two factors to be determined in examining equivalency for the assignment of coaches:
   - a. training, experience, and other professional qualifications; and
   - b. professional standing.

3. The following seven factors are contained in the *Policy Interpretation* and should be used to determine the equivalency for the compensation of coaches:
   - a. rate of compensation - salary/stipend (per sport, per season),
   - b. duration of contracts,
   - c. conditions relating to contract renewal,
   - d. experience,
   - e. nature of coaching duties performed,
   - f. working conditions, and
   - g. other terms and conditions of employment.

G. Program Component: Provision of Locker Rooms, Practice and Competitive Facilities - 34 C.F.R. §106.41(c)(7)

1. The *Policy Interpretation* lists the following six factors to be assessed in determining equivalency in facilities:
   - a. quality and availability of the facilities provided for practice and competitive events,
   - b. exclusivity of use of facilities provided for practice and competitive events,
   - c. availability of locker rooms,
   - d. quality of locker rooms,
   - e. maintenance of practice and competitive facilities, and
   - f. preparation of facilities for practice and competitive events.

H. Program Component: Provision of Medical and Training Facilities and Services - 34 C.F.R. §106.41(c)(8)

1. The *Policy Interpretation* lists the following five factors to be examined in determining equivalency in the provision of medical and training facilities and services:
   a. availability of medical personnel and assistance;
   b. health, accident, and injury insurance coverage;
   c. availability and quality of weight and training facilities;
   d. availability and quality of conditioning facilities; and
   e. availability and qualification of athletic trainers.

I. Program Component: Provision of Housing and Dining Facilities and Services - 34 C.F.R. §106.41(c)(9)

1. According to the OCR's 1990 *Title IX Athletics Investigator's Manual*, it is very unusual for an elementary or secondary school to provide housing and dining services to student-athletes.

J. Program Component: Publicity - 34 C.F.R. §106.41(c)(10)

1. The *Policy Interpretation* lists the following three factors to be assessed in determining equivalency:
   a. availability and quality of sports information personnel,
   b. access to other publicity resources for boy's and girl's sports, and
   c. quantity and quality of publications and other promotional devices featuring boy's and girl's programs.

2. Additionally, the OCR's *Title IX Athletics Investigator's Manual* notes that the availability, quantity, and quality of cheerleaders, pep bands, drill teams, etc., provided for each team should be considered in determining equivalency.

VI. What Districts Should Do To Ensure Compliance With Title IX

A. Districts Should Routinely Perform Three Tasks

1. At least once every two years (preferably once a year) districts should survey students about their athletic interests.

2. At least once every two years (preferably once a year) districts should conduct a Title IX Compliance Assessment Audit.

3. Districts should make, as needed, any necessary system-wide (and individual school) adjustments to their interscholastic athletic program.

B. Performing a Survey of Students' Athletic Interests - The Starting Point to Compliance With Title IX

1. If a Title IX complaint is filed with the OCR, the agency is likely to begin its investigation by determining if there is gender balance in the entire interscholastic athletics program--not just in individual sports. The easiest way for a school district to demonstrate it is effectively accommodating the interests and abilities of students is through conducting an annual survey of students' athletic interests.
    a. In fact, it is extremely difficult for a district to claim that its interscholastic athletic program offerings reflect the interests of the student body without surveying students.

2. Once a survey of student interests is combined with a Title IX Compliance Assessment Audit, a school district can develop a plan to correct any known Title IX problems.

NOTES

NOTES

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